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Nos. 454-7

Supreme Court of the United States

OCTOBER TERM, 1934

THE STEWART DRY GOODS COMPANY,
No. 454 v. *Appellant,*
JOHN B. LEWIS ET AL.,
Appellees.

FRED LEVY ET AL.,
No. 455 v. *Appellant,*
JOHN B. LEWIS ET AL.,
Appellees.

J. C. PENNEY COMPANY,
No. 456 v. *Appellant,*
JOHN B. LEWIS ET AL.,
Appellees.

THE KROGER GROCERY & BAKING COMPANY
No. 457 v. *Appellant,*
JOHN B. LEWIS ET AL.,
Appellees.

BRIEF FOR APPELLANTS

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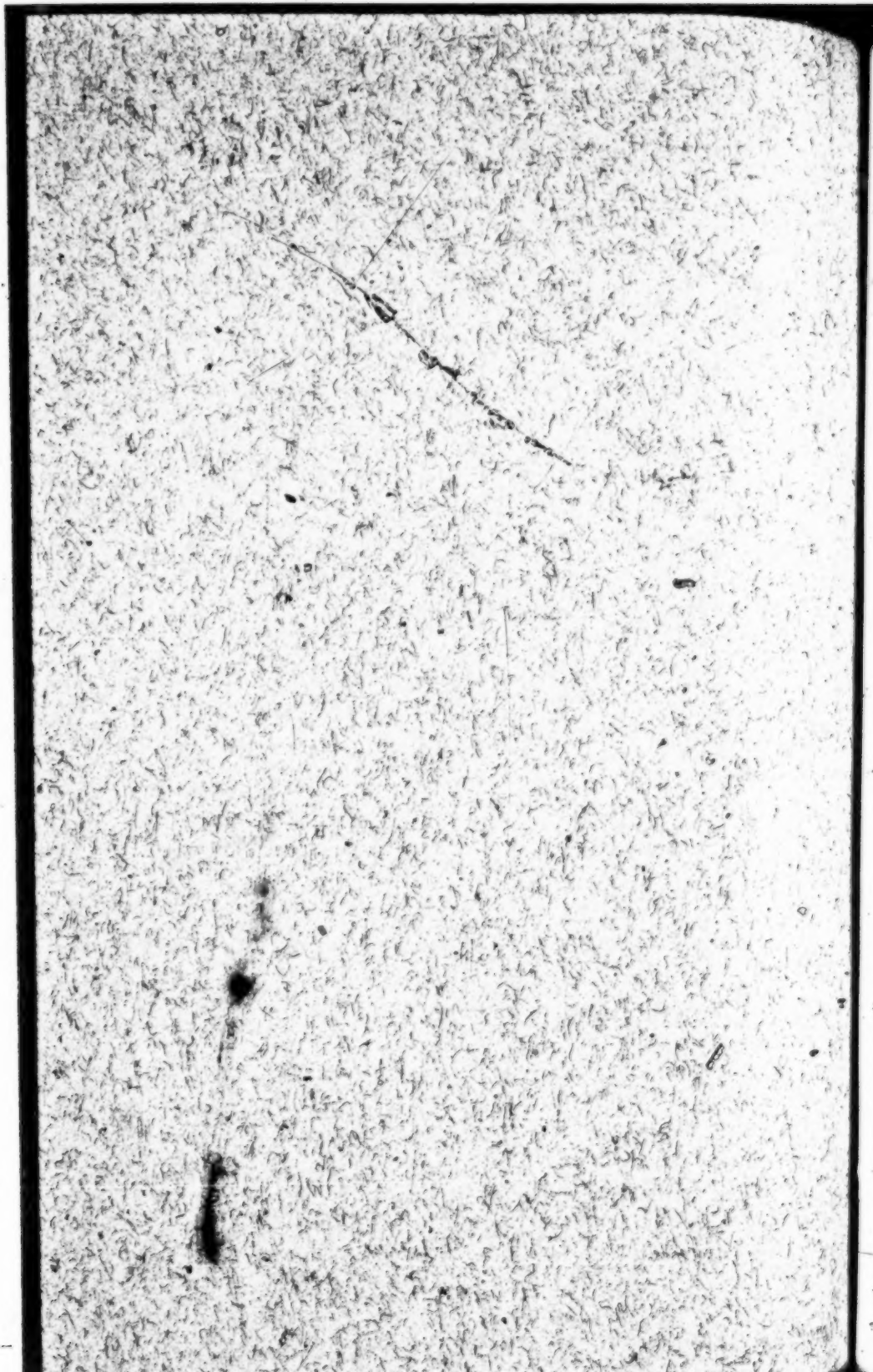

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THE STEWART DRY GOODS COMPANY,
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No. 454 v.

JOHN B. LEWIS ET AL.,
Appellees.

FRED LEVY ET AL.,
Appellant,

No. 455 v.

JOHN B. LEWIS ET AL.,
Appellees.

J. C. PENNEY COMPANY,
Appellant,

No. 456 v.

JOHN B. LEWIS ET AL.,
Appellees.

THE KROGER GROCERY & BAKING COMPANY
Appellant,

No. 457 v.

JOHN B. LEWIS ET AL.,
Appellees.

STATEMENT OF CASE

Appellants, who were plaintiffs below, prosecute these appeals from judgments of a statutory three-judge District Court, one of the Judges dissenting, dismissing four Bills of Complaint in which appellants sought an injunction and

challenged the validity of the Kentucky Gross Sales Tax Law (Acts of 1930, Chapter 149, pages 475 to 482) on Federal and State Constitutional grounds.

The challenged tax is not a chain store tax. It is a gross sales tax. It imposes a tax burden on retail sales transactions and measures the amount of tax on the gross sales price. It is not directed at sales of corporations, but falls on corporations and individuals alike. The tax is not uniform or proportionate. The rate arbitrarily increases with volume. On the face of the act a sale by appellants is taxed at a rate twenty times the rate imposed on the sale of the same article at the same price made by the other merchants of the State. In practical operation and effect, as shown in the record, a sale by one of the appellants is taxed, and a similar sale by another merchant is not taxed.

The appellants represent four different types of retail merchants aggrieved in their own particular way by the act in question.

Upon the first hearing the District Court dismissed the Bills of Complaint on the sole ground that the complainants had an adequate remedy at law. Appeals were prosecuted to this court, and upon a former hearing this court reversed the lower court and remanded the causes for further proceedings in accordance with its opinion. (*Stewart Dry Goods* v. *Lewis et al.*, 287 U. S. 9 [1932].)

The cases were subsequently retried. The court found that the remedy at law was inadequate (Finding of Facts, Stewart R. 393; Kroger R. 143) but dismissed the Bills of Complaint on the merits. A majority of the court, Judges Hicks and Dawson, held that the challenged act was constitutional. 7 Fed. Supp. 438. Judge Cochran dissented. 8 Fed. Supp. 396.

From this decision these appeals are prosecuted under Section 266 of the Judicial Code.

The "Statement as to Jurisdiction" has been duly filed under the rules, and this court has noted probable jurisdiction.

The interlocutory injunctions originally granted to the appellants restraining appellees from collecting the tax assessed under the challenged act have been continued in force in accordance with the customary practice (Stewart R. 403, Kroger R. 152), and the appellants have deposited United States Bonds or given other security satisfactory to the State of Kentucky in the amount of approximately $1,200,000.00, the estimated amount of tax assessable against them under the challenged act for the four years that it was in operation. (Stewart R. 406, Kroger R. 156.)

Findings of Fact and Conclusions of Law were made and are contained in the record and will be subsequently referred to. (Stewart R. 393, Kroger R. 143.)

Since the decision below the challenged act was repealed, effective July 3, 1934. In place of the discriminatory act complained of in the cases at bar, the Legislature adopted a uniform and equal Sales Tax. (Carroll's Kentucky Statutes, Secs. 4281v-1 to 19.) The new law is not subject to any of the constitutional objections which we contend are fatal to the repealed law.

However the Legislature did not repeal the challenged act for the period from March 17, 1930, to July 3, 1934. Hence the appellants are still subject to the heavy punitive provisions of the old law for the period involved and will be required to pay approximately $1,200,000.00, unless the repealed law is held invalid (Carroll's Kentucky Statutes, Sec. 4202a-23).

SPECIFICATION OF ASSIGNED ERRORS AND POINTS RELIED UPON

The statements of points relied upon by the appellants for reversal of the lower court decision have been duly

filed in accordance with the rules. (Stewart R. 413, Kroger R. 575, Penney R. 162, Levy R. 162.) These points are based on appropriate assignments of error. (Stewart R. 407, Kroger R. 158, Penney R. 156, Levy R. 156.)

The assigned errors which we intend to urge may be briefly summarized as follows:

1.

The challenged act deprives the appellants of the equal protection of the laws:

(a) It arbitrarily singles out for taxation every retail sale made by appellants and intervenors, and on the face of the act it levies a tax on the sale at a rate twenty times the rate imposed upon similar sales when made by ninety-nine per cent of the other retail merchants of the State.

(b) Due to the arbitrary credits allowed under Section 4 of the act, in practical operation and effect the discrimination shown on the face of the act is increased, with the result, as shown by the evidence in the record, that every retail sale of appellants is taxed, and the retail sales of nearly all the other merchants in the State are untaxed.

(c) The sales of individuals and partnerships engaged in the business of selling at retail are discriminated against in favor of similar sales made by corporations, for, under Section 4 of the act, corporations are permitted a credit on the sales tax in the amount of the corporate franchise taxes paid.

(d) The attempted classification of sales according to annual volume in eight separate brackets, according to Section 2 of the act, and the levying of a rapidly multiplying rate of taxation on each successive $100,000.00 of sales above $400,000.00 is arbitrary, discriminatory, oppressive and unsupported by any factual basis.

(e) The challenged act exempts from taxation all the sales of retail merchants who are engaged in "gardening

or farming and selling garden or farm produce raised by them in this state." (Section 1.) As written, this exemption discriminates against the sales of farm products raised in other States. Appellant Kroger raises farm products in Ohio and sells them in Kentucky. As construed by the lower court, all the sales of a merchant are exempt from tax if he sells any farm products raised by him. The sale of the farm products is not only tax exempt, but the fact that he sells such farm products exempts all of his other sales.

2.

The challenged act was designed and intended to tax the sales of appellants because their annual sales volume is over $400,000.00, and to exempt from taxation the sales of 99% of the merchants of the State because their annual sales volume is less than $400,000.00. It was designed and intended under the guise of taxation to destroy appellants and aid their competitors, thereby denying the appellants the equal protection of the law and taking their property without due process of law contrary to the Federal Constitution and the Bill of Rights of the Kentucky Constitution.

3.

The challenged act lays an unconstitutional burden on interstate commerce. It discriminates against farm products raised in other States and taxes interstate transactions.

4.

The lower court adopted a construction of the provisions of the challenged act regarding the sales of merchants who sell farm products raised by them (Section 1) which places all the sales of appellant Kroger within the exempted clause since it is actually engaged in selling farm products raised by it. This construction, if approved, would entitle the appellant Kroger to an injunction against the enforcement of the law upon any of its sales, thus resulting in

taxing the sales of the Great Atlantic & Pacific Tea Company, an intervenor, and exempting from taxation the sales of its competitor, Kroger, because Kroger raises farm products and A. & P. does not.

THE CHALLENGED ACT

The challenged act is printed as an appendix to this brief. It also appears in each record at page 6.

According to its terms the act relates to "revenue and taxation," so that it must be considered a "revenue" as distinguished from a "license" measure. The lower court found it to be a revenue act. (Stewart R. 395; Kroger R. 145.) It is called "an excise or license tax" (title of act), and in Section 2 it is termed "an annual license tax." It is also inferentially referred to in the act as an occupational or privilege tax, because it states in Section 2 that every retail merchant shall pay "an annual license tax for the opening, establishing, operating or maintaining of any store or stores." It is universally referred to as the "Kentucky Gross Sales Tax." Whatever it may be called, it is "determined by computing the tax on the amount of gross sales." (Section 2, Stewart R. 7; Kroger R. 6.)

It is contended by appellants that it is an excise tax and that the impost is not laid on the property sold, nor on the merchant for the right to exercise the privilege or occupation, but on the transaction or sale, measured according to the price at which the article is sold. *Panhandle Oil Co.* v. *Knox* (1928), 277 U. S. 218; *Indian Motocycle* v. *U. S.* (1931), 283 U. S. 570. It might very well be considered a tax on the property sold. *Cook* v. *Pennsylvania* (1878), 97 U. S. 566; *Fox Film Corporation* v. *Doyal* (1932), 286 U. S. 123; *Dawson* v. *Kentucky Distilleries* (1921), 255 U. S. 289.

Under Section 1 a retail merchant is generally defined as one who operates a store for the purpose of selling merchandise at retail, but the definition contains the following language:

"except those actually engaged in gardening or farming and selling garden or farm products raised by them in this state."

Although the act purports to tax the sales of every retail merchant not within the above quoted exception, it was purposely designed to tax the sales of plaintiffs and intervening petitioners, fifteen in number, and to exempt entirely or to exact only a nominal tax on the sales of all the other retail merchants in Kentucky, numbering approximately 24,000. This is evidenced by the fact, shown in the record, that the sales of appellants, which amount to approximately Forty-eight Million Dollars, are taxed more than three times as much as all the other sales in the State, which amount to more than Three Hundred and Sixty Million Dollars.

The Three Million Dollars in sales of Stewart are taxed nearly one-fourth as much as the Three Hundred and Sixty Million Dollar sales of 23,163 merchants. The sales of 99.9% of the merchants of the State of Kentucky, enjoying about 80% of the total sales of the State, being over Three Hundred and Sixty Million Dollars in volume, are taxed less than the Thirteen Million Dollars of sales of appellant Kroger.

This intended discrimination was accomplished by grouping merchants in eight arbitrary brackets according to sales volume. The first or low bracket includes sales up to Four Hundred Thousand Dollars. Each One Hundred Thousand Dollars in sales thereafter, until a Million Dollars is reached, is placed in a separate bracket. As evidenced in the record, 99.9% of the merchants in the State and approximately 80% of the sales in the State fall in the first or lowest bracket. Appellants all fall in the eighth, or highest, bracket.

Sales in the second bracket are taxed at double the rate of sales in the first bracket. Sales in the third bracket are

taxed at five times the rate imposed on sales in the first bracket and two and one-half times the rate in the second bracket. Sales in the fourth bracket are taxed at eight times the rate imposed on sales in the first bracket and four times the rate taxed on sales in the second bracket, and so on up until we reach the eighth bracket, wherein appellants fall, in which, on the face of the act, their sales are taxed at twenty times the sales in the first bracket.

Although the act professes to tax the sales of all retail merchants, in actual operation and effect, as shown by the undisputed facts in the record, it exempts from taxation the sales of the $400,000.00 volume merchant and taxes the sales of the so-called large volume merchant irrespective of profit or loss, capital employed, number of stores, or any other economic factor. Under the challenged act the sale of the same or similar article for the same price is either not taxed at all or is taxed at a rate which depends upon the merchant from whom the purchase is made. A sale involving a sack of flour may be taxed 1% if purchased in one store, or it may be taxed 1/20th of 1% or nothing if purchased in another store. The act taxes the sales dollar of a merchant with a large volume nearly twenty times as much as the sales dollar of a smaller competitor.

Section 4 also imposes a discriminatory tax rate on merchants doing business as individuals or as members of a partnership in favor of those doing business as a corporation. A corporation may credit against the tax on its sales the tax which it pays for the privilege of doing business in corporate form. This discriminates against the sales of Levy Bros. and the class represented in the action brought by the Levy partnership.

THE EVIDENCE

The four appellants represent four different types of merchants affected by the provisions of the act. The

Stewart Dry Goods Company operates a department store in the City of Louisville. It has been conducting its business in this fashion for approximately forty years. Its predecessors in interest have operated a store in Louisville since 1846. It sells exclusively at retail, and the merchandise handled is similar to that usually found in department stores. Stewart's store embraces approximately seventy departments. Each handles a special type of goods.

Levy Brothers are individuals who operate a department store in the City of Louisville. This business was founded approximately seventy years ago by the father and uncles of the present operators.

The J. C. Penney Company is a corporation operating a group of department stores throughout the State of Kentucky.

The Kroger Grocery & Baking Company, the fourth appellant, is a corporation operating a chain of grocery stores. Two hundred and eighty-nine stores were located in Kentucky in 1930, at the time of the filing of the Bill of Complaint.

The actions filed by the complainants and the temporary restraining order granted by the court did not interfere with the operation of the challenged act except insofar as these four complainants and the other parties protected by the restraining order are concerned. With that exception, all the merchants in the State of Kentucky coming under the provisions of this act filed their returns for the years 1930, 1931, and 1932. These returns were available for examination and analysis. For the convenience of the court we have copied in this brief a part of the analysis of returns for each year taken from the record (Stewart R. 288-A, 290-A, 292-A; Kroger R. 370-A, 372-A, 374-A) and from the lower court's findings of fact. (Stewart R. 393, Kroger R. 143.)

ACTUAL OPERATION OF THE LAW

Quoted from the Court's Findings of Fact

"Facts Relative to Fourteenth Amendment"

"6. For the year 1930, 24,163 returns were filed by merchants subject to the act, and these returns showed an aggregate of gross sales of $362,848,264.00. 24,128 of these reporting merchants showed gross sales of less than $400,000.00 each, and the aggregate gross sales of these 24,128 was $340,197,497.00. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

"7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged act upon the business of those merchants (25 in number) who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

1930

TAX REPORTS	NUMBER OF RETURNS	GROSS SALES	NET TAX
Showing Sales less than $400,000	24128	$340,197,497	$89,220.76
Showing Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Showing Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Showing Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Showing Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Showing Sales between $800,000 and $900,000	1	814,559	0
Showing Sales between $900,000 and $1,000,000	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123	11,391.76
TOTALS	24163	$362,848,264	$106,342.94

"8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the act on the business of those merchants who have posted bond, made no report and paid no tax.

1931

Showing Sales less than $400,000	20351	$290,824,180	$66,769.82
Showing Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Showing Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Showing Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Showing Sales between $700,000 and $800,000	2	1,472,166	905.08
Showing Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Showing Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Showing Sales in excess of $1,000,000	2	2,389,404	6,386.22
TOTALS	20382	$310,467,073	$85,136.99

"9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933.

1932

Showing Sales less than $400,000	14582	$178,783,514.26	$35,948.38
Showing Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Showing Sales between $500,000 and $600,000	5	2,764.557.15	1,107.50
Showing Sales between $600,000 and $700,000	1	601,558.29	.....
Showing Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Showing Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Showing Sales between $900,000 and $1,000,000	1	939,417.13	.....
Showing Sales in excess of $1,000,000	1	1,001,903.32	2,747.03
TOTALS	14597	$186,313,016.81	$42,916.69"

Discrimination Against Department Store Sales

The discriminatory features of the act are further illustrated with regard to Stewart Dry Goods Company by the fact that that company is required to aggregate the sales

in all of its departments for the purpose of determining the tax rate on its sales. Each department is in purpose and in fact a separate unit distinguished from the other departments and each is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were were so many separate and distinct specialty stores. Each department sells articles which have no relation to the articles handled in other departments. The annual sales in any single department do not exceed $400,000.00. The maximum sales in any department are $250,000.00.

Each department competes with specialty stores in the City of Louisville which sell the same line of goods, and in many instances the sales of a particular department in Stewart's are considerably less than the sales of a specialty store competing in the particular line of goods handled.

Sales at Stewart's are taxed at a rate which varies from the rate imposed on sales of similar articles sold in a specialty store. The rate is higher at Stewart's, not because the sales of a particular item, or department, exceed similar sales made at a specialty store, but because sales of all Stewart's departments are aggregated for the purpose of fixing the tax rate. As a result, sales of $250,000.00 worth of a certain article in one of Stewart's departments would be taxed at a higher rate than an equal amount of sales of the same article made in a neighboring specialty store which handles nothing else.

The District Court recognized the fact that Stewart's does not have any advantage in purchasing. (Finding of Fact No. 19, Stewart R. 399.) It found as follows:

> "The gross sales of the Stewart Dry Goods Company are approximately $3,000,000.00 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000.00, which would fig-

ure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000.00 and in a considerable number of instances the total sales of a particular department of Stewart's are approximately the same as the sales of specialized stores selling the same line of goods, and in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. *Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.*" (Italics ours.)

The advantage mentioned certainly does not justify the imposition of a tax on Stewart's sales twenty times higher than a tax on sales made by its competitors.

A further example of the discrimination is referred to in the affidavit of Mr. Levy, which appears in the Stewart record, page 81. Richman Brothers Co., a large chain store organization, maintains a store for the sale of men's ready-to-wear clothing in the City of Louisville. This store competes directly with the department in Levy Brothers handling similar items. The gross sales of the Richman Brothers store does not exceed $400,000.00, and it is therefore taxed in the lowest bracket. The sales of the competing department operated by Levy's are taxed in a much higher bracket. Richman Brothers Co. does not own or operate any other store in Kentucky. Its aggregate volume of sales in all of its stores is many times larger than the volume of Levy Brothers' business, and every advantage which Levy Brothers has in the conduct of its men's clothing department can be found to a much greater extent in the

Richman Brothers Co. organization. In spite of this fact the rate of taxation on the Levy sales is twenty times that imposed on Richman Brothers Co. When the deductions are considered, the Levy Brothers' rate of taxation on sales is forty times that imposed upon its competitor. This is not an isolated case. The National Shirt Co. and Wilson Bros., handling men's furnishings, have one store in direct competition with Levy Bros. (Stewart R. 84; Kroger R. 322.) The Liggett Drug Co., a well-known drug chain, have only one store in Kentucky. (Stewart R. 101; Kroger R. 349.)

DEFENDANTS' TESTIMONY

The defendants undertake to justify the imposition of a higher tax rate upon the sales of appellants than upon the sales of other merchants of the State upon a theory advanced by three professors, namely, Martin, Walradt and Phelps. Although these three professors had an opportunity to study the actual operation of the tax as evidenced by an analysis of fifty-eight thousand returns filed in three calendar years, they did not do so, but justified their conclusions solely upon a theoretical basis.

Professors Martin, Walradt and Phelps did not claim that there is a taxable difference between the sale of a dollar sack of flour by A or by B, but they advanced the theory that a difference arises if the sales of A exceed those of B, because presumably merchants with large gross sales have more taxable capacity than merchants with small gross sales. They did not claim that taxable capacity increased at the rapid rate at which the tax increased, but they contended that in a general way concerns having large gross sales have correspondingly large profits. This theory of the professors disregards the fact that the tax is measured or levied on the sale, and likewise disregards the fact that the taxable capacity of the merchant is not involved. The error

is made more glaring by the fact that the professors themselves referred to the act throughout the record as a "sales act." They even went so far in their discussion of the measure as a "sales act" that they discussed the question of shifting the burden from the seller to the buyer as each transaction took place, and arrived at the remarkable conclusion that the tax could be shifted or passed on notwithstanding the fact that the rate of tax on the sale of the same article at the same price varied according to whether the purchase was made from A or from B. (Stewart R. 330, 346; Kroger R. 509, 525.)

Professor Martin, of the University of Kentucky, was the leading expert employed by the State. He introduced a number of charts and tables which, when properly analyzed, disprove his conclusions. He made no study of the returns filed under the act, although he admitted that this was the best way to find out how the law works. We quote from his testimony (Stewart R. 345; Kroger R. 524):

> "The best way of finding out the distribution of the tax insofar as those who have paid is concerned, would be to examine the returns of the State Tax Commission and the best way of determining just how the law works and exactly the burden it imposes upon the taxpayers under its provisions, would be by examination of the tax returns of those who have made returns. *Such an examination would be better than any theory.*" (Italics ours.)

The actual returns were in the possession of the Kentucky State Tax Commission and were available to Professor Martin. Although he used other records of the State Tax Commission, he chose to disregard the record showing the actual operation and effect of the very tax law in regard to which he was employed to testify, probably for the reason that the actual returns and operation of the law refute the theory for which the professor contended.

Apart from their inapplicability because they disregard the fact that the incidence of the tax falls on the transaction or sale rather than on the merchant, Professor Martin's theories are not supported by his tables. As a matter of fact they show the exact opposite in the only sales brackets involved, namely, between $400,000.00 and $1,000,000.00. We contend that increase in profits is due primarily to better management and not to an increase in sales. This is illustrated by Exhibit 12 (Stewart R. 362-B; Kroger R. 498-A) introduced by Professor Martin. On this exhibit Professor Martin lists companies with a large volume of sales. The table is arranged in such a fashion that the concerns having a large volume of sales appear at the top and the others follow below as their sales decrease. Column five of this table shows the ratio of net profits to net worth and the following startling facts:

Sears-Roebuck, listed second on the table, have less than one-half the sales of The Great Atlantic & Pacific Tea Company, but the ratio of their net profits to net worth is higher. The same is true of Woolworth's, who have only one-third the sales of The Great Atlantic & Pacific Tea Company. First National Stores, which appears eighteenth on the list, has a greater ratio of net profit to net worth than The Great Atlantic & Pacific Tea Company.

It may be presumed that a fairer comparison would be between concerns in a similar line of business although the Kentucky Sales Tax Act does not take into consideration variations in business. If we examine Professor Martin's table for concerns doing the same kind of business (Exhibit 12, Stewart R. 362-B; Kroger R. 498-A), we find the same discrepancies. Safeway Stores have lower sales than Kroger, but their ratio of net profit to net worth is five per cent higher. Loblaw Grocery Stores, which is one-twentieth as large as Kroger, has a ratio of net profit to net worth double that of Kroger. These facts do not show

an increased ability to pay as sales increase. Diamond Shoe Company has a ratio of 21.18, although its sales are much lower than Kinney Shoe Company, which has a ratio of only 12.32. Reliable Shoe also have a higher ratio than Kinney, although their sales are lower.

Numerous other illustrations can be picked from Martin's exhibit and from the supplemental exhibit which he added at the time the additional testimony was taken. (Exhibit 12-B, Stewart R. 362-B; Kroger R. 540-B.) These illustrations are so numerous that they cannot be explained away by saying that the results in individual cases do not affect the general rule.

Our contention that management and not increase in sales leads to an increase in profit is illustrated in Mr. Schachter's testimony. (Stewart R. 314; Kroger R. 438.) He showed that in 1932 the Emporium of San Francisco was third in volume of sales and eleventh in net profits to sales. In that same year Lazarus of Columbus was twelfth in sales but fourth in per cent of profits. Burdine's of Miami, Florida, was eighteenth in volume of sales and sixth in profits to sales.

Bamberger's, in 1931, was second in the list of department stores in amount of sales and ranked seventh with regard to profits. That same year Lazarus of Columbus was again eleventh in order of sales but it was third in order of profit. The Outlet of Providence, Rhode Island, was first in profit that year but ranked fourteenth in sales.

In 1930 Rike-Kumler of Dayton was nineteenth in sales and third in per cent of profit. Lazarus, in the same year, was twelfth in sales and fourth in per cent of profits, and the Outlet Company of Providence again was first in per cent of profits, although it was sixteenth on the actual list by amount of sales. (Stewart R. 313, 314; Kroger R. 438, 439.)

The fact that Lazarus and Outlet stores, having smaller sales than many of their competitors, appear year after year to lead in profits, shows that there is no relation between sales and profits.

Figures of Bureau of Business Research of Harvard University show that there is no relation between increase in sales from $400,000.00 to $1,000,000.00 and Profit or Losses.

We call attention to another table covering stores having sales between $400,000.00 and $1,000,000.00—the only brackets where the tax is graduated. On page 46 of the Bureau of Business Research of Harvard University publication dealing with the operating results for department and specialty stores in 1929 (Bulletin No. 83) appears a tabulation for department stores by sales volume. The net profit or loss for department stores of various sales volume appears as follows:

SALES	Less than $150,000	$150,000-$299,000	$300,000-$499,000	$500,000-$749,000	$750,000-$999,000
Net profit or loss	Loss 0.9%	Loss 1.1%	Loss 0.8%	Loss 0.4%	Loss 0.5%
Net gain % of net worth	6.3%	5.0%	6.0%	6.8%	6.6%

This shows that the percentage of net gain to net worth is lower in the highest class listed than it is for the preceding class. The net loss is also higher. Here we have average figures for sales closely corresponding to the brackets which are subject to the graduations of the taxing statute. These standard figures of the Harvard Bureau prove that increased sales in these brackets do not show any increased ability to pay a higher tax. Instead we have a decreased ability to pay. In 1930 we find a similar result:*

* Bureau Business Research, Harvard University, Bulletin 85, page 6.

1930

SALES	Less than $150,000	$150,000-$300,000	$300,000-$500,000	$500,000-$750,000	$750,000-$1,000,000
Net profit or loss	Loss 5.2%	Loss 2.4%	Loss 2.3%	Loss 1.7%	Loss 2.3%
Net gain % of net worth	L. 3.3%	0.1%	1.5%	2.3%	0.6%

The same is true in 1931 and 1932—

1931

*SALES	Less than $150,000	$150,000-$300,000	$300,000-$500,000	$500,000-$750,000	$750,000-$1,000,000
Net profit or loss	Loss 8.0%	Loss 6.6%	Loss 5.2%	Loss 4.5%	Loss 5.8%
Net gain % of net worth	Loss 7.0%	Loss 8.0%	Loss 3.0%	Loss 3.5%	Loss 4.0%

1932

†Sales (000 omitted)	Less than $150	$150-$300	$300-$500	$500-$750	$750-$1,000	$1,000-$2,000	$2,000-$4,000	$4,000-$10,000
Net profit or Loss	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%
Net gain % of net worth	L. 12.2%	L. 9.0%	L. 5.0%	L. 10.0%	L. 6.0%	L. 4.0%	L. 6.7%	L. 3.5%

From these figures it appears that as sales increase, there is no increased ability to pay.

To summarize, Professor Martin's theory is not supported by the factual testimony he introduced. When sales increase between $400,000.00 and $1,000,000.00, there is no increase in ability to pay, as shown by Martin's own figures. Furthermore, the whole of Martin's testimony, as stated previously, is based on theoretical tabulations and completely disregards the actual operation of the tax as shown by the analysis of the returns. Taxation is a practical matter, and, where possible, the court should decide the validity of the tax measure on the basis of actual returns and not on a theoretical hypothesis.

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* Bureau Business Research, Harvard University, Bulletin 88, page 2.

† Bureau Business Research, Harvard University, Bulletin 91, page 2. Stewart R. 324A; Kroger R. 448A.

Professor Phelps, like Professor Martin, admitted that he made no examination of the returns to ascertain the actual operation of the law.

We quote from Phelps' testimony (Stewart R. 369; Kroger R. 553):

> "Witness had made no examination of the actual operation of the Kentucky Gross Sales Tax Law as it applied to the various taxpayers to whom the law presumptively applied."

Professor Phelps merely expressed some general theories in an effort to support the theories of Professor Martin. We submit that a taxing measure of this character should not be decided on the basis of assumption or theory—particularly when we have the complete evidence of the actual, as distinguished from the theoretical, operation and effect of the law for the entire period that the law was in force.

Professor Walradt devoted himself largely to an alleged comparison of the arbitrary rates in the challenged act with the graduations of the Federal income tax law. It is obvious that a tax on net income wherein the rate increases as net income increases is based solely upon ability to pay. The Kentucky Act makes no reference to income—net or gross. The tax is based upon "gross sales" irrespective of receipts or collections, returns or profits. In *Sims* v. *Weldon,* 165 Ark. 13, 263 S. W. 42, the Supreme Court of Arkansas appropriately said:

> "A sales tax is the antithesis of an income tax."

This important distinction between a tax on net income and a tax on gross sales was clearly set forth by this court in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321 (1918). Mr. Justice Pitney said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial,

> and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise.* Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (Italics ours.)

Professor Walradt, in an endeavor to smooth into a gradually increasing line the sharp jumps of the challenged tax, has invented and charted the theory of an "effective rate."

These are not the rates provided by the act, which levies a flat tax on each bracket so that every dollar of sales from one dollar to four hundred thousand dollars pays a flat rate of 1/20th of 1%, less credits, and every dollar in the next hundred thousand dollar bracket pays double. Each successive hundred thousand dollars up to a million pays at the flat rate provided for that hundred thousand. Every dollar of sales above a million is taxed at a flat rate of twenty times the rate on the first four hundred thousand dollars' worth of sales. However, Professor Walradt is guilty of presenting certain misleading charts in connection with the presentation of the non-existent effective rate. On his Exhibit A (Stewart R. 164-A; Kroger R. 464-A) he has plotted the line of the so-called "effective rate" on logarithmic chart paper. This makes the tax rates in the lower brackets appear steeper than they actually are in comparison with the increase of the tax rates in the upper brackets, which appear to be more gradual than they actually are.

When Professor Walradt on his Exhibit D (Stewart R. 170-A; Kroger R. 470-A) charts his so-called effective rate on arithmetic chart paper, he deliberately fails to include the entire first Four Hundred Thousand Dollar bracket, presumably because this line would be absolutely flat and would seriously damage the presentation of his theory.

A further criticism of the testimony of the professors and the charts they introduced can be based on the fact that a large part of their testimony and a number of their charts were predicated on graduated taxes recently adopted by Vermont and New Mexico. Both of these acts were modelled after the Kentucky Act. They are both being contested in the state courts and have been held to be invalid by the lower courts of both states. See note p. 34 *infra*.

Mr. Brewer (Stewart R. 212; Kroger R. 553), Secretary of the State Board of Charities & Corrections, testified that the State needed money to repair its prisons and reformatory institutions. Granting the needs of the State, it can hardly be claimed that this justifies placing the entire burden of repairing the State's penal and charitable institutions on the sales of a few arbitrarily selected retail merchants.

King, Glenn and Huddleston (Stewart R. 325, 369, 373; Kroger R. 568, 571, 574) testified concerning the financial condition of the State of Kentucky as bearing upon the adequacy of the remedy at law. Since the court below found the remedy inadequate (Stewart R. 393; Kroger R. 143) and the State has not taken any appeal from this finding, we do not think it necessary to discuss the evidence on this point.

SUMMARY OF ARGUMENT

I. Nature of Act.

II. Nature of Sale.

III. The Challenged Act Deprives the Appellants of the Equal Protection of the Laws.

A. *Denial of Equal Protection of the Laws is shown on the face of the act.*

B. *Denial of Equal Protection of the Laws is shown in the actual operation and effect.*

C. *The credits granted by Section Four of the act intensify the discrimination and make it vindictive and deceptive.*

D. *The act discriminates in favor of corporations as against individuals.*

E. *The rate increases are arbitrary and bear no relation to the alleged value, if any, of the privilege of making larger aggregate gross sales.*

F. *The opinion of the court below ignores the evidence of the actual tax returns showing the discriminatory, punitive and unequal operation of the law.*

G. *The cases relied upon by the State do not uphold the arbitrary inequalities and discriminations of the challenged act. Clark* v. *Titusville, 184 U. S. 329; Magoun* v. *Illinois Trust Company, 170 U. S. 283; State Board of Tax Commissioners* v. *Jackson, 283 U. S. 527; Pacific American Fisheries* v. *Alaska, 269 U. S. 269; Moore* v. *State Board of Charities and Corrections, 238 Ky. 243, 239 Ky. 729, distinguished.*

IV. The Farm Exemption Provision Renders the Challenged Act Unconstitutional.

A. *The act as written discriminates against farm products raised in states other than Kentucky and violates the commerce and equal protection clauses of the Federal Constitution.*

B. *The construction of this clause adopted by the lower court exempts retail merchants selling farm products raised by them from any tax. This construction denies the equal protection of the laws to merchants selling farm products not raised by them and is an unconstitutional discrimination.*

C. *The lower court erred in following the construction placed upon the law by the Court of Appeals of Kentucky in Moore* v. *State Board of Charities & Corrections.*

D. *If the construction of the farm exemption provision adopted by the District Court is approved, then The Kroger Grocery & Baking Company is not subject to tax, and the discrimination against its competitors, including the intervenor, The Great Atlantic & Pacific Tea Company, renders the law unconstitutional.*

V. The Challenged Act Violates the Bill of Rights and Section 181 of the Kentucky Constitution.

ARGUMENT

I. Nature of the Act.

The act is not a chain store tax. Its burden is not measured or graduated according to the number of stores or retail outlets, as was the case in *Tax Commissioners* v. *Jackson* (1931), 283 U. S. 527; *Great Atlantic & Pacific Tea Co.* v. *Maxwell*, 199 N. C. 433, 154 S. E. 838, affirmed per curiam (1931), 284 U. S. 575; *Liggett* v. *Lee* (1933), 288 U. S. 517; *Fox* v. *Standard Oil Co.* (1935), — U. S. — (Decided Jan. 14, 1935).

The act is not aimed at curbing the growth or size of corporations, for it applies with equal force against individuals such as Levy Brothers, appellants.

The act is not directed at large profits because it falls just as heavily upon one who suffers loss as upon one who makes inordinate profits.

It is not a license tax, for no license is required and there are no provisions for inspection, suspension, revocation or other regulatory features.

It is not a police measure, for it has no reference to the public safety, welfare or morals.

It is a revenue measure. It is so stated in the preamble, and so considered throughout the act. The revenue derived is appropriated in the act and divided one-half to the State's charitable institutions and the other one-half to liquidate the public debt. (Section 9.) The lower court declared it a revenue measure in its findings of fact. (Stewart R. 395; Kroger R. 145.)

It seems to be well established that the nature of a tax is to be determined not by "some form of words" used in its enactment or name given to it, but by an examination of its "nature and effect."

Pollock v. *Farmers Loan & Trust Co.* (1895), 157 U. S. 429, 581.

Stockard v. *Morgan* (1902), 185 U. S. 27.

Galveston, H. & S. A. R. Co. v. *Texas* (1908), 210 U. S. 217.

Choctaw, O. & G. R. Co. v. *Harrison* (1914), 235 U. S. 292.

Dawson v. *Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288.

St. Louis Cotton Compress Co. v. *Arkansas* (1922), 260 U. S. 346.

The Macallen Company v. *Mass.* (1929), 279 U. S. 620.

The use of the words in Section 2: "Every retail merchant . . . shall pay an annual license tax" for "opening, establishing, operating or maintaining" a store, does not, we submit, make it a license tax on the merchant. This is a "form of words" used in nearly all sales tax laws as a feature of the administration of the law facilitating the collection of the tax and not for the purpose of designating

the kind or nature of the tax. Sales taxes cannot be effectively collected from the purchaser for obvious reasons, though they are inevitably passed on to the purchaser if the tax is proportional. It cannot be passed on if one merchant pays it and another does not, for equally obvious reasons.

In sales taxes the burden is laid, so far as the "form of words" is concerned, in three different ways, i. e.:

(1) Upon the merchant making the sale.
(2) Upon the article sold.
(3) Upon the sales transaction.

An example of the first type, that is, upon the merchant making the sale, is the Mississippi Gasoline Tax Statute considered by this court in *Panhandle Oil Co.* v. *Knox* (1928), 277 U. S. 218. Under that statute (Chapter 116, Laws of Mississippi 1922) it was provided that:

> "Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1¢ (one cent) per gallon. . . ."

To decide the point of law involved in that case it was necessary for the court to determine the nature of the tax as well as to determine the thing that was taxed. The court said:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. . . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

An example of the second type of sales taxes, that is, where the "form of words" lays the tax on the article sold, will be found in the Revenue Act of 1924, considered by

this court in *Indian Motocycle Co.* v. *U. S.* (1931), 283 U. S. 570. The words in that statute provided that the tax "shall be levied, assessed, collected and paid upon" the motorcycle by the manufacturer "equivalent to the following percentage of prices for which so sold."

As in the preceding case, it was necessary for this court to determine the nature of the tax and to say upon what the tax burden was laid. The court said:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is laid on the sale. Counsel for the government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these, and the sale. We think it is *laid on the sale, and on that alone.* It is levied as of the time of the sale and is measured according to the price obtained by the sale. . . .
>
> "Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation." (Italics ours.)

The third type of sales tax, that is, where the "form of words" in the act specifically designates the transaction of sale as the thing to be taxed, places the tax where it rightly belongs. Such sales tax acts will be found in Oklahoma and Utah.*

These sales tax laws vary in other ways in the "form of words" for purposes of convenient administration, but the words employed should not be considered, and were not in-

* Oklahoma, Chap. 196, 1st Special Session of 1933; Utah, Chap. 63, Laws of 1933, as amended by S. B. No. 6, 2nd Special Session, Laws of 1933.

tended, to determine what is taxed. In every instance regardless of the "form of words" the thing taxed is the sale, and in every instance regardless of the "form of words" as to who shall pay the tax, the instrumentality through which the tax is collected is the retail merchant.

Under the Ohio Retail Sales Tax, for instance (Ohio Gen. Code, § 5546-1 et seq.), the tax is "levied on each retail sale" (§ 5546-2). But the law further provides (§ 5546-3) that the "tax hereby imposed shall be paid by the consumer."

In Michigan, the sales tax (House Enrolled Act 167, Public Acts of Michigan of 1933), by the form of words, is levied upon the merchant as "an annual tax for the privilege of engaging in such business." (Section 2.) This law forbids the merchant to hold out to the public that the tax is not absorbed in the price. (Section 3.)

We submit that in every sales tax, regardless of the language of the act, the tax imposed is an excise, and the burden is laid upon the sale transaction.

The challenged act in "form of words" would fall in the first class mentioned above, i. e., upon the merchant making the sale. The words used are almost identical to the words used and considered in *Panhandle Oil Co.* v. *Knox, supra.* The "form of words" of Section 2 of the challenged act denominates it an annual license tax for the privilege of operating a store. So did the Mississippi statute considered in *Panhandle Oil Co.* v. *Knox, supra.* The challenged act computes the tax on the amount of gross sales. The Mississippi Act computed the tax on the quantity of gasoline sold. If the tax in the gasoline case is "laid on the sale," it must be true in the case at bar. If the fact that the tax is to be paid or collected from the seller is immaterial in determining what is taxed in the one case, it must be true in the other. If the fact that it is called a privilege tax for engaging in business may be disregarded

in determining what is taxed in one case, it must be disregarded in the other. If "measured according to the price" constitutes it a sales tax in the one case, "computing the tax on the amount of gross sales" must make it a sales tax in the other case.*

II. Nature of a Sale

Since the sale transaction and not the property, the buyer, or the seller, is the subject of taxation, i. e., the thing taxed, it is necessary to determine just what a sale is. Furthermore, it is necessary to determine whether there is any substantial difference affording a just and reasonable ground for a classification which results in taxing a sale by A at a different rate than a sale by B of the same article at the same price.

If there is any substantial difference justifying the classification according to who is the seller, it would be equally

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* Numerous other cases might be cited involving taxes which were license or privilege taxes in form but which this court held were in actual operation and effect taxes upon the thing used as a measure of the tax. For instance, in *Galveston & H. R. Co.* v. *Texas* (1908), 210 U. S. 217, a tax upon railway corporations measured by or "equal to 1% of their gross receipts" was held to be a tax upon the gross receipts regardless of the language used in the act. In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin* (1927), 275 U. S. 136, a Wisconsin "annual license fee" measured by the gross income of the corporation was held to be a tax laid directly on the gross income, regardless of the form of the taxing act. In *New Jersey Bell Telephone Company* v. *The State Board* (1930), 280 U. S. 338, a New Jersey statute was in form a franchise tax measured by 5% of gross receipts. Here, too, this court held that the form of the tax was immaterial and that the tax had to be treated as a tax upon the gross receipts.

As has been pointed out by this court, there is a vast difference between a tax measured by a *gross* and one measured by a *net* amount. This distinction was clearly stated in *U. S. Glue Company* v. *Town of Oak Creek* (1918), 247 U. S. 321, discussed *infra*. p. 38.

Since in the case at bar the tax is measured by the *gross* sales, the validity of the tax must be determined by treating the tax as upon the sale and not upon the merchant.

true that the classification could be made to depend upon who is the buyer. The establishment of such a legal principle would be unique, and yet, if such a classification is justified in Kentucky, where the rate depends upon how many other sales have been made in the calendar year by the seller, it would be permissible to fix the rate of a tax on a sale according to the number of other purchases made by the buyer during the calendar year.

The Uniform Sales Act defines a sale as:

> "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Section 1, Uniform Sales Act, 1 Williston on Sales, 2nd Edition.)

Since a sale is an agreement, it would seem to be elementary that two separate agreements for the sale of two sacks of the same kind of flour at the same price would be similar, if not identical, in legal contemplation. If one were a conditional and the other an absolute sale, the agreement would, of course, be different.

The challenged act, however, seeks to differentiate between the two sales not because of any difference in the sale agreements, but upon the sole fact of a claimed distinction in the *character* of the seller. There is no difference in the property sold or the price paid. There is a difference between the sellers, A having effected a greater volume of sales than B of other property to other persons in a given calendar year. This difference does exist, but it bears no reasonable relation to the subject of the legislation, i. e., the taxing of the sale of the sack of flour.

III. The Challenged Act Deprives the Appellants of the Equal Protection of the Laws

A. Denial of equal protection of the laws is shown on the face of the act.

On its face the act classifies a merchant's aggregate annual sales into eight different brackets, the first or low bracket including all sales up to $400,000.00. Each $100,000.00 in aggregate annual sales beyond $400,000.00 is a separate bracket up to $1,000,000.00. Aggregate annual sales in excess of $1,000,000.00 constitute the top bracket. Sales in the top bracket are taxed twenty times as much as sales in the first bracket. Sales in the second bracket are taxed twice as much as sales in the first bracket.

In making the contention that this kind of a sales tax denies to the appellants and intervenors, all of whom are in the highest bracket and are the only merchants in Kentucky in that bracket, the equal protection of the laws, we have given due consideration to the most liberal construction of the equal protection clause of the Fourteenth Amendment. Conceding that the State has power to classify both persons and property for purposes of taxation, conceding further that this power of classification is very broad and flexible, nevertheless, the classification must be reasonable and not arbitrary; it must rest upon some real ground of difference having some real relation to the legitimate purpose of the legislation. *Louisville Gas Co.* v. *Coleman* (1928), 277 U. S. 32. The classification cannot amount to a clear and hostile discrimination against particular persons or property. (Mr. Justice Brandeis, dissenting, *Louisville Gas Co.* v. *Coleman, supra.*) The equal protection clause is intended, it seems to be agreed, as a guarantee that all persons and all property similarly situated shall be treated alike.

The discrimination intended here is clear and hostile. It was so stated in the act as originally introduced. It stated not only one, but two clear and hostile discriminations: (1)

"To restrain the unfair competition of chain stores," and (2) "In aid of individual merchants." *.

It is true that before the final adoption of the act, an innocent-looking title was substituted, but as adopted, the act upon its face shows a clear and hostile intent to discriminate between the aggregate gross annual sales of merchants with sales of less than $400,000.00 and those with aggregate sales in excess of $400,000.00, basing the classification solely on gross volume of business done.

We must recognize now that a State may classify retail merchants for purposes of taxation according to the number of stores or retail outlets he operates. *Tax Comm.* v. *Jackson, supra.* We must also recognize that having the power so to classify, it may lay taxes on the different classes graduated so as to tend to discourage a merchant

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* The challenged act was introduced under the following title:

"H. B. 111, An act to restrain the unfair competition of chain stores and in aid of individual merchants of the commonwealth."

On February 14, 1930, the bill was read in the House by the above title. On February 18th it was made a special order and was read a second time by the above title only. Subsequently, the title was amended to its present form, but was apparently enrolled and signed by the Speaker of the House under its original title, which also appears on the manuscript copy of the bill. (Kroger R. 449.) Also see extracts from Senate and House Journals (Stewart R. 220-234) put in evidence by defendant (Stewart R. 235, 236).

Shirley Haas, Secretary of the Wholesale and Retail Grocers Association, who sponsored the bill in the Legislature, issued a circular to the members of his association in which he pointed out that the measure would relieve all retail merchants from the payment of anything but nominal taxes and would heavily penalize department and multiple store owners. He pointed out that this would be achieved by means of the graduated scale and by application of the provision regarding deductions of the credits permitted by Section 4, which "the association was successful in writing into the bill." He concluded that

"Our investigation has shown that very few independent retailers enjoy business in excess of $400,000.00. Our further inveatigation indicates that . . . 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

"We know that one chain institution alone (and in the grocery business by the way) will be subject to tax under this new law in excess of $150,000.00." (Stewart R. 95; Kroger R. 357.)

from operating a large number of stores and to encourage or aid the merchant with a single store. *Fox* v. *Standard Oil Co., supra.* The challenged act, however (although originally intended as a chain store tax), accomplishes no such purpose. It strikes at single and multiple store merchants alike, and places the classification squarely and solely on aggregate volume of gross sales, assessing a tax upon the sales of large volume merchants many times the tax assessed upon the sales of merchants in the $400,000 class.

Sales taxes have been enacted in almost every State since the challenged act was adopted.* We have (1) retail sales taxes; (2) wholesale sales taxes; and (3) manufacturers sales taxes. The rates vary from one to five per cent. Having seen gasoline sales taxes begin at one cent per gallon and increase year by year until now in most States the rates are at least five cents a gallon, and, in several States, six, seven and eight cents per gallon, one is not altogether a dreamer who anticipates at least a four or five per cent

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* See California, Chap. 1020, Session Law of 1933;
Connecticut, Rev. Code 1930, Chap. 75, Sections 1340-1351;
Delaware, Code 1915, T. 3, Chap. 6, Art. 12, Sections 159-161, Laws 1917. Chap. 11, Laws 1919, Chap. 23;
Georgia, Code of Georgia, 1930, Supplement, Act of 1929, Section 993 (316);
Illinois, Laws of Illinois, 58th General Assembly, 1933, p. 924;
Indiana, Burns Indiana Statutes, 1933, Chap. 26, Sec. 64-2601;
Iowa, Chap. 82, Laws 45th G. A., Extraordinary Session, Section 37, etc.;
Kentucky, Carroll's Code of Kentucky, Section 4281v-3;
Michigan, Public Act No. 167, Acts of 1933;
Mississippi, Acts of 1934 (H. B. 70);
Missouri, Laws of Missouri, Extra Session, 1933-34, p. 155;
New Mexico, Chap. 33, First Special Session Laws of 1934;
New York, Cahill's Consolidated Laws of New York, 1933, Supplement, Chap. 61, Section 390, etc.;
North Carolina, Acts 1933, Chap. 445, p. 768;
North Dakota, Laws 1933, Chap. 261;
Ohio, General Code, Sec. 5546-1, etc.;
Oklahoma, Chap. 196, First Special Session of 1933;
Oregon, Laws 1933, H. B. 110, Second Special Session;
Pennsylvania, Act No. 53, Acts 1932, Second Special Session, as amended by Act No. 126, Laws of 1933;
Utah, Chap. 63, Laws of 1933, as amended by S. B. No. 6, Second Special Session, Laws of 1933;
Vermont, Public Act No. 24, Laws of 1933;
Washington, Chap. 191, Laws of 1933;
West Virginia, Chap. 66, Second Extraordinary Session, 1933, p. 146.

sales tax. It is true that the top rate in the challenged act is only one per cent, but, if the principle of taxing the sales of one merchant at a higher rate than similar sales by other merchants is recognized by judicial decision as consistent with the equal protection clause of the Fourteenth Amendment, you will see the sales of so-called large merchants taxed at five per cent, whereas similar sales of the small competitors will be untaxed. This would simply bring economic chaos.

It is an obvious economic fact that a merchant cannot pass on to, or collect from, the purchaser a sales tax which is imposed upon him but not imposed upon his competitor. It is equally obvious that he cannot absorb it in the cost, or in his overhead. Such a tax puts him on an unequal basis with his competitor, and we contend that the spirit and purpose of the equal protection clause was to assure him the right to conduct his business on an equal basis with his competitor. If he absorbs the tax as a part of the cost of the merchandise, he cannot meet the competitive price of his neighbor who is untaxed. If he attempts to pass the tax on to his customer, the customer will shun him and deal with the neighbor who has no tax to pass on to his customer or to absorb in his cost. In States like Ohio where the tax is imposed directly upon the purchaser, one who would patronize a so-called large merchant and pay a tax for the privilege of doing so, when he could purchase from the so-called small merchant and not be subjected to any tax, would be very foolish. Under such a system of sales taxes, a great store like Stewart's, forty years in the building, could be destroyed over night. Levy Brothers, appellants, a partnership which operates another great store and which represents the fair dealing of three generations of the same family, would meet a like fate.

The result prophesied is not fanciful,* it is a real danger because of the fact that the challenged act lays the tax on the gross sales and not on the net profits. The record clearly shows, and it is an economic fact of which a court will take judicial notice, that there is no fixed relation between gross volume and net profits. The margin of profit on the sale of some commodity, like jewelry, is usually large. The margin of profit on the sale of a commodity like sugar is very small. A large jewelry store might be able to absorb a small sales tax in its cost or overhead and still compete with a smaller competitor. But if the sales of the large jewelry store and the sales of the small jewelry store could be classified differently, a five or ten per cent tax could be laid upon the sales of the large store and the sales of the small store could be untaxed. In such an event, on the sale of a commodity such as jewelry, even where the ordinary margin of profit is high, the large jewelry store, being unable to absorb the tax or pass it on, would be destroyed.

On sales of commodities such as sugar, flour, and nationally advertised products such as Ivory Soap, Del Monte Peaches, and Quaker Oats, the retail merchant could not pay even the smallest sales tax on the sales price and compete with a neighbor whose sales were untaxed.

If the principle is once established that the volume of sales may be the sole ground for classification in retail sales taxes, the same classification would be permissible in wholesale and in manufacturing sales taxes. Wherein would

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* A tax graduated up to 4% has already been levied.

Sales tax rates are proportionate in all the sales tax acts with the exception of the challenged act, the Vermont Act (No. 24, Acts of 1933), and the New Mexico Act (Chapter 73, Laws of 1933).

The New Mexico act was recently held invalid in the case of *Safeway Stores, Inc.* v. *Vigil*, State Comptroller, First Judicial District Court, County Santa Fe, New Mexico.

In the Vermont Act, the rate is graduated from 1/8 of 1% to 4%. It was held unconstitutional in the case of *The Great Atlantic & Pacific Tea Co.* v. *Harvey*, Washington County Chancery Court, Vermont, Jan. 23, 1935.

a wholesaler be given the equal protection of the laws if his sales were taxed at one per cent or more and his competitor's sales were not so taxed? What would happen to any manufacturing establishment, and the men in its employ, if a manufacturer's sales tax were imposed upon its product and not upon its smaller competitors'?

In some States such as Michigan (House Enrolled Act No. 167, Public Acts, Michigan, 1933, Sec. b-2) the sales of electric current are subject to tax. An electric light plant in a large city necessarily has a larger volume of sales than a similarly situated plant in a small community. An electric light plant, being more or less a monopoly, could, of course, pass the tax on either directly or by absorption in the cost. If the sales tax on electric current were graduated according to volume, as is done in the challenged act, the consumer would be taxed higher in the larger city than if he lived in the smaller city. Stores in large cities necessarily sell more than competitive stores in suburban or rural centers. Should the city consumer be arbitrarily forced to pay a higher tax on food, clothing, drugs, etc., than his suburban or rural neighbor?

Is gross volume of sales sufficient as the sole basis of classification under the equal protection clause of the Fourteenth Amendment?

This court stated in *Louisville Gas Co.* v. *Coleman* (1928), 277 U. S. 32, at page 39:

> "The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

Mr. Justice Holmes, in *Engle* v. *O'Malley* (1911), 219 U. S. 128, at page 138 stated:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small."

Can there be any evil in a retail merchant or in his department store because his aggregate annual sales exceed

$400,000.00, or even a million dollars? If his profits become too great, they can be reduced by an income tax, with the higher rates in the higher brackets justified by this court's decisions because the rate applies to net income and does not apply to gross income. See *Brushaber* v. *Union Pacific R. R.* (1916), 240 U. S. 1; *U. S. Glue Co.* v. *Town of Oak Creek, supra; Shaffer* v. *Carter* (1919), 252 U. S. 37. If he operates too many stores he can be discouraged by a chain store tax. *Fox* v. *Standard Oil Co., supra.* With these well-recognized limitations upon him the equal protection clause of the Fourteenth Amendment surely permits the retail merchant to offer his merchandise to the public on a competitive basis and permits the public to deal with him without paying a larger tax.

Classification based solely on gross volume was expressly disapproved in *Cotting* v. *Kansas City Stock Yards Co.* (1901), 183 U. S. 79, under the equal protection clause. It is true in the Cotting case that the discrimination claimed was a regulation rather than a tax, but it would seem that if a regulation were bad because the attempted classification was based solely on gross volume, a tax classification so based would be equally obnoxious. In the Cotting case, the court said at page 103:

> "The express and only basis of classification is in the amount of business done by the two classes."

The court also states at page 109:

> "May we not rightfully accept this declaration of law . . . an act which imposes regulations upon corporations doing business over a certain amount and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition."

And at page 112:

> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and *direct*

> discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would." (Italics ours.)

This court in dealing with the commerce clause of the constitution and in questions involving the right of a State to levy a tax which infringes upon Federal sovereignty, or vice versa, has many times pointed out the distinction between a direct and indirect burden on interstate commerce, or challenge to Federal or State sovereignty. This court has many times said that taxing gross receipts, which is equivalent if not synonymous with gross sales, is a direct burden on commerce, while a tax upon net income is not. In *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, at page 328, Mr. Justice Pitney stated:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (Italics ours.)

It is this difference between taxing gross receipts and taxing net profits which makes the challenged act, in the

(Insert page 38.)

See also *Crew Levick Co.* v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, in which a gross sales tax levied at a flat rate on the whole volume of appellant's business "*½ mill on each $1.00 of the whole volume, gross of business transacted annually*", was held invalid as a direct regulation of foreign commerce and an impost on exports. This Court said, page 297: "It (the tax) bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. *It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions.* * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." (Italics ours.)

words of Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Co., supra,* "a positive and direct discrimination between persons engaged in the same class of business."

The interstate commerce clause of the Federal constitution forbids a State to levy an impost on interstate commerce just as the equal protection clause forbids a State from adopting a tax measure which denies the equal protection of the laws. Both provisions are limitations on the powers of the State.

In considering the question whether a particular tax measure is invalid because it affects interstate commerce, this court has made a distinction between taxes measured by gross income and taxes measured by net income. If the tax is measured by the gross income, the State has overstepped its powers, and the law is invalid. *Galveston & H. R. Co.* v. *Texas* (1908), 210 U. S. 217. A contrary result is reached when the tax is on net income. *U. S. Glue Co.* v. *Town of Oak Creek, supra.* The basis for the distinction is the fact that the former is a direct charge upon interstate commerce and the latter is only indirect and incidental.

The distinction should apply with equal force to the power of the State to levy a graduated tax under the equal protection clause of the Fourteenth Amendment. If the tax is on net income, then it may be graduated since it is only an indirect charge on the thing that bears the burden of the tax. In the event the tax is measured by gross receipts, as here, there is a direct charge on the thing, or transaction, which bears the incidence of the tax and in such cases the State's power, it is submitted, should be limited to levying a proportionate rate.

The same parallel may be drawn and the same distinctions noted in cases involving foreign commerce. A State can no more levy an impost on foreign commerce than adopt

a tax measure which denies the equal protection of the laws. In considering the question whether a particular tax measure is invalid because it affects foreign commerce, this court has made the same distinction between taxes measured by gross income and taxes measured by net income pointed out in the interstate commerce cases. If the tax is measured by the gross income, the State has overstepped its powers and the law is invalid. *Crew Levick Co.* v. *Pennsylvania* (1917), 245 U. S. 292. If the tax is measured by net income, it is valid. *Peck & Co.* v. *Lowe* (1917), 247 U. S. 142. The former is a direct charge upon foreign commerce; the latter is only indirect and incidental.

This distinction should apply with equal force to the power of the State to levy a graduated tax under the equal protection clause of the Fourteenth Amendment. In such a case a tax based on net income may be graduated since the burden does not fall directly on the transaction; however, a tax based on gross receipts cannot be graduated because the burden is direct and falls on each transaction. Since there is no difference between the transactions, a tax which falls with unequal force upon them denies the equal protection of the laws to the persons consummating them.

The court's finding illustrates the discrimination shown on the face of the act.

The court found (Finding No. 16 under Facts Relating to Equal Protection, Stewart R. 399, Kroger R. 148) as follows:

> "16. Sales made by merchants taxed under any of the brackets of the act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the act."

Bearing in mind that "a tax upon gross receipts affects each transaction" (*U. S. Glue Co.* v. *Town of Oak Creek, supra*), we have here a finding by the court of discrimina-

tion. Sales of the same character of goods fall into different brackets, or in other words, similar transactions are taxed at different rates. Since this is a tax on gross receipts, it should affect similar transactions in the same way. The fact that it does no do so renders the law invalid.

B. Denial of equal protection of the laws is shown in the actual operation and effect.

The record contains a complete analysis of the actual operation of the challenged act for a period of three taxable years. (Stewart R. 285 et seq.; Kroger R. 370 et seq.) The lower court made specific findings regarding the actual operation of the law. (Stewart R. 396, Kroger R. 146.) There are approximately 25,000 retail merchants in the State of Kentucky. 24,163 filed returns, of which 24,128 reported sales of less than $400,000.00. This was in the year 1930. In the year 1931, out of 20,382 filed returns, 20,351 were in the low bracket. In the year 1932, 14,597 filed returns, of which 14,582 were in the low bracket. Complete details are in the testimony of Brendel, beginning at page 285 of the Stewart record, and page 367 of the Kroger record. A fair summary of the facts relating to the operation of the act is given in the dissenting opinion of Judge Cochran as follows: (Stewart R. 387, Kroger R. 121.)

> "*The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act.* The returns for the year 1930, 1931 and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264.00 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty-

five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000.00 the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000.00, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company pay more than one-half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of The Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one-fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00. Of those 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff,

> The Kroger Grocery & Baking Company, its profit in this state was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.
>
> "Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. *The Statute is both vindictive and deceptive.*" (Italics ours.)

The actual operation of the challenged act, as evidenced by reports filed under it, shows that the discrimination is much greater than the discrimination shown on the face of the act. On the face of the act, it would appear that all sales are taxed slightly and that large sales are taxed at a high rate. In actual operation, however, virtually all sales in the State of Kentucky are untaxed except the sales made by the plaintiffs and intervenors, which are taxed at the highest rate.

C. The credits granted by Section Four of the act intensify the discrimination and make the act vindictive and deceptive.

Section 4 provides that the merchant may deduct from his tax an amount equal to the sums paid by him for special license taxes to the State. By payment of these special license fees, a merchant secures a special privilege from the State. He is permitted to sell something that other merchants are not allowed to sell, or else he may operate in a manner which cannot be adopted by those who have not paid the special license fees. Under the challenged act

the merchant has not only the advantage of this special privilege, but is also accorded a special advantage over his competitor by being permitted to use the sum which he pays for the special privilege to wipe out his obligation under the sales act. The result is that his sales remain untaxed while those of his neighboring competitor are taxed.

Probably the best illustration of the discrimination resulting from this provision is the case of the exemption allowed the sales of individuals selling prescription whiskey. A druggist selling 400 pints of prescription whiskey per year at $3.00 per pint would receive $1,200.00 therefor. He would be permitted by virtue of such sales to secure exemption from the payment of the tax on any other sales up to $400,000.00. He would be required to pay a special tax to the State of 50¢ per pint. (Section 4214b-1, Carroll's Kentucky Statutes.) This would amount to $200.00 and would be exactly equal to the tax on $400,000.00 worth of sales. A druggist selling $400,000.00 worth of goods, therefore, of which amount $1,200.00 would represent the receipts from sales of 400 pints of prescription whiskey, would not be required to pay any tax on his other sales of $398,800.00 worth of goods. Yet sales of similar articles by his neighbor would be subjected to the tax. The Stewart Dry Goods Company, one of the appellants in this case, sells many articles commonly handled by drug stores. Sales by Stewart would be taxable, but the same sales would be exempt in the neighboring drug store because a small amount of prescription whiskey was sold in the same establishment.

In actual operation, therefore, *all* of the sales of the merchants who handle particular products for which they pay a special license tax are exempted from the sales tax. Since the act purported to be a general sales tax law, it follows that there can be no justification for such an exemption. The exemption has no relation to the purpose for which it was made. (*Smith* v. *Cahoon* [1931], 283 U. S. 553.)

In its operation the deductions allowed actually exempt practically all merchants from the payment of any tax on their sales. The Legislative history shows that this was known and intended and was included in order to discriminate against the sales of the few merchants who were arbitrarily selected to bear the onerous burdens of the act. (Stewart R. 93, Kroger R. 354.)

D. The act discriminates in favor of corporations against individuals.

Among the credits which a merchant is permitted to take under Section 4 of the act is an amount equal to his payment for the corporation license tax. Necessarily the only merchant who can take advantage of this credit is the corporate merchant. He can secure a virtual exemption for his sales because he pays a corporation license fee for the privilege of operating in a form which gives him limited liability and other advantages over the individual merchant. The individual merchant, as a result, is forced to compete with the corporation on an unequal basis. Sales made by the individual merchant are subject to full tax, but sales made by the corporate merchant are free from tax to the extent of the corporate credit.

This discriminatory feature of the act is illustrated by the fact that Levy Brothers, who operate their business as a partnership, do not receive the deduction for corporation license fees which is given to merchants who operate in the form of corporations.

In the case of *Quaker City Cab Co.* v. *Pennsylvania* (1928), 277 U. S. 389, the court held unconstitutional a statute which imposed a tax upon corporations operating taxicabs but which exempted individuals so engaged. Such discrimination was denounced as *unusual*. In striking down the tax the court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner

> is a corporation. *The discrimination is not justified* by any difference in the source of the receipts or in the situation or character of the property employed. . . . . No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the State Court in this case, the section violates the equal protection clause of the Fourteenth Amendment. (Citing authorities.) The tax cannot be sustained." (Italics ours.)

In the case of *Garysburg Mfg. Co.* v. *Pender* (1930), 42 Fed. (2d) 500, reversed on other grounds by the Circuit Court of Appeals, 56 Fed. (2d) 732, a three-judge court held void a North Carolina statute for intentional discrimination between individuals and corporations in the matter of taxation of shares of stock owned by them in foreign corporations.

Thus discrimination *against* a corporation was held to violate the equal protection clause. *A fortiori,* discrimination *in favor of* corporations against Levy Bros. and other individuals and partnerships is not only *unusual,* but wholly unjustifiable.

In *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, Mr. Justice Sutherland said (p. 522):

> **"A classification which is bad because it arbitrarily favors the individual as against the corporation, certainly cannot be good when it favors the corporation as against the individual."**

The lower court met this contention with the statement that the Commonwealth of Kentucky could repeal those provisions of its statute which impose special license fees on corporations, and Levy Brothers could not object to such action. They inferred that the credit system was a *pro tanto* repeal insofar as competitors of Levy Brothers were concerned. Such a conclusion is not justified by the act. Section 4 itself provides that the sales tax shall not

be "in lieu of any . . . corporation license tax due under provisions of any law now in force." This certainly would not indicate any intention to repeal the corporation license tax.

It is well known and has been recognized by this court that corporations have decided operating advantages over operation by individuals. *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107 at 163. Certain individuals, however, for reasons of their own, continue to conduct their business without incorporating. They are willing to forego limited liability in order that their business may not lose the personal relationship which exists between the individual and his customers. Except for certain businesses, such as banking, where the State can require incorporation, the individual cannot be forced to operate in corporate form. Retail selling is one of such businesses, and the right of an individual or a partnership to sell goods without incorporating is one of the rights protected by the Fourteenth Amendment, which provides that no individual shall be deprived of his "liberty" without due process of law. Merchants who desire to pay a special fee for the permission to operate in the form of corporations should not be permitted to use this special privilege to exempt their sales from taxation. If they are permitted to do so, then the only way the individual competitor can compete with them would be to incorporate.

The statute and the credit system provided by Section 4 discriminate against individuals in favor of corporations or force them to incorporate in order to meet the competition of their corporate competitors. Under the first alternative the merchant is deprived of the equal protection of the laws; under the second he is deprived of his liberty without due process of law.

E. The rate increases are arbitrary and bear no relation to the alleged value, if any, of the privilege of making larger aggregate gross sales.

The record shows that an increase of sales from $400,000.00 to $1,000,000.00 does not have any relation to increased profits or increased net gain. The increase in tax cannot be justified on the basis of the evidence in the record; nor can it be justified on the ground that there is a tendency for profits to increase progressively as sales increase. That there is no such tendency is shown by the facts. A popular belief cannot be used as a basis for sustaining the measure when that belief is shown by the appellees' own evidence to be incorrect.

The very fact that the tax is on *gross* sales and not on *net* earnings demonstrates that "ability to pay" was not considered as a basis for the classification.

The finding of the court that there is some evidence supporting this theory (Finding No. 10 under Facts Relative to Fourteenth Amendment, Stewart R. 398, Kroger R. 147) is rendered meaningless by the finding of the court which immediately follows it. The court decided that (Finding No. 11, Stewart R. 398, Kroger R. 147) "The rate of profit realized from sales at retail generally *varies with the character of the goods sold.*"

Disregarding the fact that there is no relation between gross and net receipts and assuming that there is an economic law to the effect that large volume inherently insures a large percentage of profit, there is nothing in the record and no economic law to justify the multiplying rates fixed in the challenged act. In the first place, fixing the lowest bracket at $400,000.00 in sales is certainly arbitrary, and particularly so when more than ninety-nine per cent of the merchants are in that class.

Is there any justification for saying that the privilege of selling a piano is worth twice as much after you have sold

$400,000.00 worth of pianos and other merchandise than it is before you have sold $400,000.00 worth of such merchandise? Certainly no one can justly say that the privilege of selling a piano is worth twenty or forty times as much after you have sold $1,000,000.00 worth of merchandise, than it is before you have sold $400,000.00 worth of such merchandise.

This act, both upon its face and in actual operation, does not evidence an intent to increase the rate in proportion to the value of the privilege of making sales; rather, there is a clear manifestation of a hostile determination to destroy the business of the plaintiffs and intervenors under the guise of classification.

Surely there is no evil in sales exceeding $400,000.00 requiring their destruction. Large cities must have large buildings, large stores and large factories.

Even if we were to grant that volume or size alone is a sufficient ground for classification, certainly the size or volume of Stewart's, with three million dollars of sales, and Levy Brothers, with a million and a half dollars of sales, is not sufficient in law to constitute a menace to the public, even in the Commonwealth of Kentucky. But if that were true, there is no justification in law or morals for such an outrageous discrimination as taxing their sales twenty or forty times as much as the sales of their competitors.

In *Airway Appliance Co.* v. *Day* (1924), 266 U. S. 71, in speaking of a franchise tax, the court said:

> "Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

It is submitted that the privilege of making a sale at retail would under no circumstances warrant the imposition of a tax twenty times the tax imposed upon a competitor for making the same sale.

F. Opinion of the court below ignored the evidence of the actual tax returns which show the discriminatory, punitive and unequal operation of the law.

The majority opinion in the lower court completely disregarded and ignored the data regarding the actual operation and effect of the tax, although the court found that the evidence introduced by appellants correctly showed its operation and effect. (See Findings of Fact Nos. 6, 7, 8, and 9 under heading "Facts Relative to Fourteenth Amendment." Stewart R. 396; Kroger R. 146.) *No reference is made to these facts in the court's opinion.* Instead, the court relied on a so-called *theory* of economics that "as a general proposition, ability to pay increases with volume of business because, generally speaking, increased volume of business means increased profits." The court declared that there were theories to the contrary but that the tax measure could be justified on the ground that it was a "good faith exercise of legislative judgment and discretion."

In the recent case of *Borden's Farm Products Company* v. *Baldwin,* 75 L. Ed. 130, 55 Sup. Ct. 187 (1934), Mr. Chief Justice Hughes discussed the weight which should be given to the presumption which attaches to legislative action. He said:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. . . . It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack.*" (Italics ours.)

In *Nichol* v. *Ames,* 173 U. S. 509 at 516 (1899), this court said:

> "Taxation is eminently practical, and is in fact, brought to every man's door, and for the purpose of

deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and of contradiction among those who are experts in the science of political economy."

Similar language has been used in numerous cases. In *Shaffer* v. *Carter*, 252 U. S. 37 (1920), it is said that:

> "The constitutionality of such a tax depends upon its practical operation and effect, not on mere definitions or theoretical distinctions respecting its nature and quality."

The necessity for the consideration of actualities rather than theories was recently referred to by Mr. Chief Justice Hughes in the *Borden's Farm Products Company* case, *supra*. He stated:

> *"With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."* (Italics ours.)

Judge Cochran in his dissent rejected theory in favor of the facts as to the practical operation of the tax. He said "the statute is both vindictive and deceptive." It is deceptive because it purports to tax the sales of all retail merchants when in actual operation and effect and by means of the increased rates provided by Section 2 and the deductions provided by Section 4, it actually exempts the sales of practically all merchants and lays a heavy impost on sales made by a handful of their competitors. It is vindictive because of its severity; a few merchants pay practically the entire tax.

The attention of the lower court was called to the discrimination against department stores. The only justification for the discriminatory difference in the tax mentioned by the lower court is that "this unitary classification of department stores . . . undoubtedly conduces to simplification in the collection of the tax."

No argument of convenience of collection can justify the imposition of a tax on the sales of one merchant. (Stewart) one-fourth as large as the tax assessed against 24,163 competing merchants whose aggregate sales are more than 120 times greater. (Stewart's sales, $3,000,000.00; 24,163 competitors, $362,000,000.00.)

G. The cases relied upon by the State do not uphold the arbitrary inequalities and discriminations of the challenged act.

Clark v. Titusville, 184 U. S. 329 (1902)

The above case involved the constitutionality of an ordinance of the City of Titusville imposing a small license tax upon merchants in that city. It was an occupational tax in different amounts (not percentages) measured by sales. The amount of the tax per dollar of sales was somewhat less as the volume increased. ($5.00 for a merchant who did a business of $1,000.00, to $100.00 for a merchant who did a business over $60,000.00.) The attempt was to levy the tax proportionately to sales so that every one would pay a relatively similar percentage. The gradation was not worked out with mathematical certainty, but the net result was that the merchant with large sales paid a somewhat smaller sum in proportion to sales than a merchant with smaller sales. This inequality was incidental, and there was no material or intended discrimination such as exists in the cases at bar.

(Insert page 53.)

We find that the ordinance involved in the Titusville case, which is not fully printed in the report, is printed in full in the record of the case (Record No. 91, October Term 1901, Office of the Clerk of this Court). An examination of the ordinance will quickly demonstrate its entire lack of similarity with the sales tax law under attack here and render inapplicable the opinion in that case to the case at bar. That ordinance was adopted June 28, 1888. It required the license fee to be paid before July first of the same year and that the Mayor, upon being shown the receipt, should issue the license for the ensuing year. The license fee was fixed by the Ward Assessor, the amount depending upon what he "esteemed" or estimated the annual sales of the merchant amounted to. Apparently the assessor based his estimate on the sales of the preceding year.

The amount of the license fee did not fall upon each sale transaction. It was not measured as of the time of sale or according to the price obtained by the sale but bore an incidental or indirect relation to the general sales volume for the preceding year. This is necessarily true for two reasons. In the first place, in each class the license fee was exactly the same, whether a merchant's sales barely exceeded the maximum amount permitted in the next lower class or almost reached the minimum amount in the next higher bracket. See Class 6 (sales between $10,000.00 and $20,000.00—tax $35.00) as an example. If a merchant is in this class his license fee is $35.00 whether he sells $1.00 more than $10,000.00 or $1.00 less than $20,000.00. In the second place, when he gets his license for the ensuing year there is no restriction on the amount that he can sell during that year under that license. He may sell a million dollars worth of merchandise for the license fee of $35.00.

The Kentucky cases referred to on pp. 62-63 of appellee's brief are similar. For example, in *Gordon* v. *City of Louisville*, 138 Ky. 442, a small privilege tax was imposed upon the occupation of merchandise broker, on exactly the same plan as the Titusville license. The Kentucky cases were decided under Kentucky law and no Federal questions were raised or passed upon.

It will be noted that above $10,000.00 of sales, both retail and wholesale, the percentage was practically the same, no matter how much the sales increased. In other words, it was proportionately equal.

The ordinance involved in the *Titusville* case merely imposed a small license fee approximating the cost of inspection. While it may cost more to inspect a large concern than it does to inspect a small concern, the percentage of the cost to the size of the business decreases as the business increases. This was recognized. Concerns with large sales were charged a greater amount in dollars than concerns with small sales, but large concerns were charged a lesser sum in proportion to sales than the small concerns. The proportionate difference between the amount charged concerns with large sales and concerns with small sales was slight—but a few hundredths of a per cent.

In the *State Railroad Tax Cases*, 92 U. S. 575, 612 (1875), the court said apropos of such small differences:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized."

There is a vast difference between a small tax of from $5.00 to $100.00, proportioned according to the cost of inspection in an effort to assess the license fee equally, and a sales tax which practically exempts the sales of 99.9% of all retail merchants.

There is a vast difference between a case where the legislative body, in its efforts to be fair and equal, graded a small license fee downward with some incidental inequalities, and the case at bar where the legislative body made a conscious effort to effect a clear and hostile discrimination against the appellants.

The *Titusville* case is a typical case of a small license fee imposed on the merchant to pay the cost of inspection and regulation and borne by all in equal proportions. The Gross Sales Tax Law is not a license measure but a sales tax weapon to "aid" some merchants at the expense of others imposed on the transaction at disproportionate rates.

The status of Clark, the plaintiff in the *Titusville* case, is not clearly shown in the Supreme Court report of the case. It can be determined, however, by a reference to a report of the decision in the case handed down by the Supreme Court of Pennsylvania, when it had the case under consideration. The Pennsylvania decision is reported in *Commissioners, etc., to The Use of the City of Titusville,* v. *Clark,* 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348. The briefs of the counsel are digested in the L. R. A. report. From this digest, it appears that counsel conceded that classification was proper, but Clark complained that under the ordinance as drawn, he might be required to pay $35.00 on $10,100.00 worth of business while another taxpayer would only have to pay $25.00 on $9,900.00 worth of business. The court held that the increase was proper since it was an attempt to create uniformity. In other words, it was an attempt, in a rough way, by increasing the amount of tax to make the tax proportionate. The case did not involve one in which the rates increased.

Magoun v. Illinois Trust, 170 U. S. 283 (1898)

The above case sustained a graduated inheritance tax law. Inheritance taxes stand apart from other taxes. The court said, at page 288:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which

confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Again, at page 290, the court says:

"And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The Illinois inheritance law under consideration graded the tax on inheritances by the amount of the inheritance. In justification of this provision Justice McKenna said, at page 300:

"The tax is not on money; it is on the right to inherit; and her[illegible] condition of inheritanee, and it may be graded accor[illegible]g to the value of that inheritance."

There is no natural right to inherit. It is a privilege conferred by the State. The State may take all or such percentage of the inheritance by escheat or taxation as it chooses. Furthermore, a graded inheritance or estate tax has the further justification that it is based upon the ability of the taxpayer to pay the tax. The ability of a man who inherits more property or who has a large income to pay a higher rate of tax than a man with less property or less income is the principal justification for graded income and inheritance taxes. The Kentucky sales tax entirely disregards the ability of the taxpayer to pay the tax. As previously pointed out, a taxpayer with large sales may sustain a loss, while a taxpayer with much smaller sales may make a profit. Nor are sales a measure of the amount of property owned by the taxpayer. The volume of sales may

depend upon the character of the business and the number of times the capital invested in such business is turned.

While there is no natural right to inherit property, the taxpayers in the cases at bar, have a natural, lawful and constitutional right to engage in their respective businesses in the State of Kentucky. They can not be deprived of that right by the State and the State is not free to condition that right as it chooses.

It can hardly be urged that inheritance taxes graded in accordance with ability to pay, and taxing the privilege of inheritance or succession, are a precedent for arbitrary and discriminatory sales taxes.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931)

This case is known as *The Indiana Chain Store Tax* case. It decides one point—*and one point only*—that chain stores may be classified for taxation separately from department stores and other stores singly owned or operated in the same place and under the same roof.

An analysis of both the majority and minority opinion in the *Jackson* case shows that the court was dealing solely with a chain store measure. The court goes so far as to point out the difference between department stores (such as the Stewart Dry Goods Co. and Levy Bros.) and separate stores conducted as a chain under common ownership and management. On this point it says at page 536:

> ". . . it is, nevertheless, evident that, whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously, greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, *must after all consist of many separate types*

each devoted to a single store similar to an independent retail store. The mass buying done *by a chain store owner* for a number of units selling the *same goods* is not comparable to the *individuated* purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, *essentially separate,* and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a *chain store* owner operating an equal number of units all devoted to a *single line* of business." (Italics ours.)

This language used in the majority opinion might well have been taken from the affidavits of Mr. McKim and Col. Levy respectively in their cases (Stewart R. 70, 81; Kroger R. 297, 319) showing that in the matter of buying power their respective department stores come into active competition with individualized specialty stores buying and selling a much larger volume of shoes or books or various other articles handled by a department store and yet taxed in the lower brackets of the act.

Thus the majority opinion is in fact as well as in effect an authority in support of the contentions made in this case by the Stewart Dry Goods Co. and Levy Bros. and other department stores similarly situated.

In the majority decision handed down in the case of *Liggett Co.* v. *Lee,* 288 U. S. 517, Mr. Justice Roberts pointed out "that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store *or department store.*"

Bearing in mind the fact that the measure under consideration at the present time is not a chain store law but strikes seriously at department stores and at the same time exempts their competitors, one can readily see that the *Jackson* case is not in point.

Fox v. *Standard Oil Company,* decided by this court January 14, 1935, is another chain store tax case in which this court followed the *Jackson* case and the principles therein established. The tax in question in that case was not levied on sales.

Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925)

In the above case an act of the territory of Alaska regulating and taxing canneries was assailed. Under the terms of that law a large pack of fish was taxed at a higher rate than a small pack. No question of the Fourteenth Amendment or the equal protection of the laws was involved. The claim was made that the territorial taxing act was contrary to the act of Congress of August 24, 1912, creating a Legislative Assembly in the territory of Alaska. Some claim was made that the tax contravened the Fifth Amendment and denied due process of law, but the latter claim does not seem to have been particularly stressed in argument. The act was sustained as being within the territorial power and within the sovereign right to protect fishing in the territory of Alaska and to prevent large packs, which would have a tendency to injure fishing. The court said at page 277:

> "Any tax is a discouragement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a short-sighted rush for fish. . . .
>
> It is not unworthy of notice that in Section 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, C. 818, Sec. 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of game and fish is recognized, and also that the latest revision of the fish law by

Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction with the way in which those powers had been used. Act of June 6, 1924, c. 272, Sec. 8; 43 Stat. 464, 467."

The above is the heart of the decision, which holds that the taxing act was a proper exercise of a granted power to protect *ferae naturae*.

Moore v. State Board of Charities & Corrections, 238 Ky. 243, 37 S. W. (2d) 41; 239 Ky. 729, 40 S. W. (2d) 349 (1931).

This case is discussed under the second heading of this brief where we show from the record that the issues in the State Court case were feigned for the purpose of prejudicing the rights of appellants who were contesting these cases in the Federal Court. No taxpayer was a party to the State Court suit and the decision must be disregarded in the consideration of this case.

IV.

The Farm Exemption Provision Renders the Challenged Act Unconstitutional.

Section 1 of the Kentucky Gross Sales Tax Law defines who are merchants subject to the tax. It reads in part as follows:

"The words 'retail merchant' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; **except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State.**"

The above quoted language is a clear discrimination against the sales of farm products grown in other states. Similar attempts by one State of the Union to erect a tax barrier against products raised in other States of the Union have frequently been declared invalid by this court. The above language is clear and unambiguous. It requires no construction. It means what it says. Merchants actually engaged in farming and selling farm products *raised by them in Kentucky* are exempt from taxation. All of their sales are exempt. They are not within the class which the legislature intended to tax. Merchants engaged in farming and raising farm products in other States and selling such farm products in their stores in Kentucky, are not within the language of this exemption and were intended to be taxed. Kroger *raises* farm products in *Ohio.* (Finding of fact, Stewart R. 401, Kroger R. 150.) It *sells* these products in its stores in *Kentucky. Its sales are not exempt.*

The Gray-Von Allmen Sanitary Milk Company *raises* similar farm products *in Kentucky* and *sells* the same in its *Kentucky stores. All of its sales are exempt.* (Kroger R. 293.) This is one of the examples of the intended discrimination shown in the record.

The State apparently recognized that the discrimination made by the legislature could not be successfully defended in court and would render the entire law unconstitutional under the authority of *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540 (1902). The State, therefore, sought to obtain a construction diametrically opposed to the plain language of this exemption which would save the act from invalidity on this ground. For this purpose the State picked a plaintiff (Forrest Moore) friendly to the State to bring a suit against the State. (Stewart R. 96; Kroger R. 358.) Moore was not a taxpayer, did not raise farm products and was merely a useful tool. The Court of Appeals of Kentucky held that Moore had no interest and

refused to pass upon the feigned case. *Moore* v. *State Board of Charities & Corrections*, 238 Ky. 243, 37 S. W. (2d) 41 (1931).

In dismissing the suit the court said:

> "The plaintiff below and appellant here is Forrest Moore who brings the suit as a general taxpayer. *SO FAR AS THIS RECORD SHOWS, HE IS NOT ONE OF THAT CLASS WHICH WILL BE COMPELLED TO PAY ANY TAX UNDER THE ACT IN QUESTION.* . . .
>
> On the hearing the appellant introduced one short affidavit. The appellees took proof by witnesses heard orally in court. Thereupon the case was submitted. . . . It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard." (Our emphasis.)

The court then cited the following Kentucky cases in which it was held improper to decide a controversy which would affect the rights of genuine litigants not made parties to the case:

Town of Beaverdam v. *Vincent*, 223 Ky. 490, 3 S. W. 2nd 1090

Fiscal Court of Carter County v. *Strother*, 199 Ky. 825, 251 S. W. 1003

Commonwealth, etc., v. *Farmers State Bank*, 225 Ky. 759, 10 S. W. 2nd 274

White v. *Walker*, 226 Ky. 326, 10 S. W. 2nd 1071.

The Civil Code of Practice of Kentucky specifically provides in Section 28 as follows:

> "The court may determine any controversy between parties before it, *if it can do so without prejudice to*

> *others;* if it cannot do so, it must require such other persons to be made parties, *or must dismiss the action without prejudice.*" (Italics ours.)

The Kentucky Court of Appeals then continued (37 S. W. 2nd 42):

> "Under these authorities and the section of the Code itself, it is manifest that a representative of the class of taxpayers which will have to bear the burden of this tax should be made a party to this suit. . . . The judgment of the lower court is therefore reversed for proceedings consistent with this opinion."

After the Court of Appeals held that Moore could not maintain a contest of the law because he had no interest adverse to the State, Moore obliged the State by making the D. T. Bohon Company a cross-defendant. This was after the cases at bar were filed and submitted in the Federal Court, and temporary restraining orders against the enforcement of the act issued.

The Bohon Company did not complain because it had been picked out of 25,000 retail merchants as a party defendant. It answered that it was a taxpayer and continued the prosecution of the *Moore* case. *The State admitted that Bohon was a taxpayer.* However, the Bohon Company did not claim to raise farm products in Kentucky or elsewhere. It was not engaged in interstate commerce. It subsequently developed that Hanley Bohon, who operated the company, had a financial interest in upholding the law which he pretended to attack. Upon this feigned issue *in which the State, Moore and Bohon had the same purpose, namely, to sustain the law and to secure a construction thereof by the Court of Appeals which would relieve it from the infirmity apparent on its face,* the case again went to the Court of Appeals. *That court was not apprised of the true facts and decided the case upon the assumption that Bohon was a tax-*

payer and was engaged in a genuine contest of the law. Moore v. *State Board of Charities & Corrections*, 239 Ky. 729.

Subsequently, the tax returns were audited for appellants by certified public accountants, who **discovered that the D. T. Bohon Company was not a taxpayer and was one of those benefited by the law, instead of injured as it had falsely alleged. Its tax return showing "No tax due," audited and approved by the State Tax Commission, is reproduced in its entirety in the record** (Stewart R. 284-A and B; Kroger R. 366-A and B) **and is reproduced in this brief as Appendix A. (See page 96.)**

It further developed in a suit brought by the Louisville Courier-Journal against Bohon that he not only was benefited by the act **but at the very time he pretended to contest the law he had a contract with the State Board of Charities and Corrections by which that Board agreed to pay Bohon $110,000.00 for certain land to be used for State purposes, provided the law was sustained. Case No. 34807, Franklin Circuit Court. The petition and answer in this case are printed as Appendix B to this brief. (See page 98.)**

Bohon had a direct financial interest in helping the State secure a favorable decision on all points.

It is obvious that since Bohon was not a taxpayer, he was not in a position to urge any discrimination, and since his business was in the lower brackets of the tax, he could not complain of the severity of the tax as applied to him. Since Bohon did not raise or sell farm products, he was in no position to complain of the discriminatory operation of the farm exemption provisions. No one except the three conspirators, to-wit: the State Board of Charities & Corrections, Moore, and the Bohon Company were parties to this trumped-up case, which was taken to the Court of Appeals without disclosing to that court that the alleged attack was a sham promoted by the State for the purpose

of affecting the real controversy which had been previously brought in the Federal court with the appellants and intervenors as parties. The District Court in this case by a finding of fact has affirmatively found that Bohon represented in the Court of Appeals that he was a taxpayer and that the Court of Appeals was thus innocently misled into deciding the case upon that false assumption. (Finding of Fact No. 2. Stewart R. 401; Kroger R. 151.) This also appears in the second opinion of the Kentucky Appellate Court, 239 Ky. 729, 40 S. W. 2nd 349.

Referring to the first case, the court said (40 S. W. 349, 350, Col. 1):

> "We reversed the judgment of the court solely on the ground that the record failed to show that Moore was one of the class of taxpayers who would have to pay the gross sales tax if the law were upheld and that a decision on the constitutionality of that law *should not be had without some taxpayer who would have to pay the tax being made a party.*" (Italics ours.)

The court then said that on the return of the case to the lower court "D. T. Bohon & Company, one of the class of taxpayers who will have to pay the gross sales tax if that law be held constitutional, was made a party defendant to the suit."

We have proved without contravention that the above allegation of Bohon and Moore that Bohon was a taxpayer was deliberately false and constituted a fraud upon the Court of Appeals of Kentucky. That court would not have decided the case had it known that Bohon was no more a taxpayer than Moore and stood to benefit by helping the State sustain the law on which he simulated an attack.

The intention of the parties in the Moore-Bohon sham suit to embarrass this genuine proceeding in the Federal courts is proved by the claim asserted by Bohon, admitted by the State and adjudged by the lower court, that the

State of Kentucky had given its consent to be sued *in the Federal courts.* This was one of the issues in the Federal Court. It was not involved in the state action. A ruling was sought which would prejudice the action of complainants, who chose the Federal tribunal.

No question of interstate commerce was involved, yet the parties jointly persuaded the court to devote three and a half columns of its opinion to a discussion of this question. This could have had no other purpose than to prejudice the genuine controversy then pending in the Federal courts, where interstate commerce questions had been raised by parties engaged in such commerce and vitally affected by the tax on interstate transactions.

It is too clear for argument that a case decided under such circumstances upon issues feigned by the parties should have no consideration here. Furthermore, none of the parties in that case disclosed or made available to the Court of Appeals the facts with reference to the actual operation of this tax law. The Kentucky Court of Appeals did not have before it any analysis of the tax returns filed by 24,000 retail merchants and did not know the facts with reference to the appellants and the intervenors in this case. Hence the reasoning of the Court of Appeals was based upon premises which were assumed without foundation in the record and which were presented by agreement of the parties without oral argument in the Court of Appeals. For these reasons we submit that the *Moore* case is not worthy of further consideration.

The only consideration to which the *Moore* case is entitled is as a reflection of the extremity to which certain representatives of the State or the Independent Merchants Association were put in their effort to sustain an unconstitutional law. When parties are forced to resort to a sham controversy for the purpose of effecting adversely a genuine controversy then pending in the Federal courts, the

sham case should recoil like a boomerang upon the heads of those guilty of having misled the Court of Appeals of Kentucky.

We believe that the facts contained in this record and the arguments advanced in this brief are a sufficient answer to the reasoning of the Court of Appeals in the *Moore* case since that decision was not based upon a true record or upon a real controversy between the adverse parties.

In its consideration of the exemption provision in the first section of the act, the Court of Appeals was misled by the litigants, when it was urged that the language *"raised by them in this State"* meant *"raised by them anywhere and sold in this State."* This astounding construction cannot otherwise be accounted for. The Court of Appeals in the last *Moore* case said:

> "We are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not the word 'raised.' . . . It was plainly the purpose of the act to exempt from its operation those (merchants) engaged in gardening and farming and selling their own products. Such sales the legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. . . . We conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this state their own products no matter where grown. With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls."

In making this construction the court had in mind the question whether the exemption resulted in discrimination against foreign-grown products which would violate the interstate commerce clause of the Federal Constitution. However, the construction of the Court of Appeals, although intended to relieve the act of one constitutional objection, makes it subject to a more serious objection, be-

cause, as construed by the Kentucky court, all retail merchants who raise farm products anywhere and sell such products in Kentucky are exempt, while competitors who sell farm products not raised by them are subject to tax on all of their sales.

For the peculiar reasons stated above, it becomes necessary to discuss the farm exemption provision of the challenged act from several different angles.

First, we contend that the construction placed upon the act by the Kentucky court was not made in a *bona fide* case. It is not binding in this case for various reasons, hereinafter discussed, and is patently wrong. Hence we first discuss the unconstitutionality of the exemption contained in the act as it is written, disregarding the construction of the lower court.

Second, assuming that the Kentucky court and the lower court were correct (which we deny) in construing the law to exempt all of the sales of all merchants selling farm products raised by them anywhere and to tax the sales of all merchants selling farm products not raised by them, we contend that this construction also renders the law unconstitutional.

Third, we urge that the lower court erred in following the construction of the Court of Appeals in *Moore* v. *State Board of Charities & Corrections, supra.*

Fourth, we submit that if the construction adopted by the lower court is approved, then the appellant Kroger is exempt from tax on all of its sales because it raises farm products which it sells in its stores in Kentucky. We further contend that to exempt Kroger and to tax the sales of The Great Atlantic & Pacific Tea Company, which sells farm products not raised by it, plainly denies the equal protection of the laws to competitors in the same class.

A. The act, as written, discriminates against farm products raised in States other than Kentucky and violates the commerce and equal protection clauses of the Federal Constitution.

The exemption of all of the sales of merchants selling farm products raised by them in Kentucky is an integral part of the legislation under consideration.

If this exemption is invalid, the entire act falls because the exception cannot be eliminated without imposing a tax on a large class of merchants whom the legislature did not intend to tax. *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540 (1902). In that case Section 9 of the Illinois Anti-trust Act provided:

> "The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

This court held, first, that the exemption was invalid, and, second, that the entire act was rendered unconstitutional by this invalid exemption. On the second point, the court said:

> "If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended they should not be regarded as offending against the law. . . ."

There can be no question that the entire tax act must fall if the exemption of merchants selling farm products is invalid. The law as written raises a tax or tariff barrier against garden and farm products raised outside of Kentucky. Similar laws have been held unconstitutional in the following cases:

Welton v. *Missouri,* 91 U. S. 275 (1875).

Guy v. *Baltimore,* 100 U. S. 434 (1879). The syllabus of this case reads:

> "A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden of tax than upon like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them."

Webber v. *Virginia,* 103 U. S. 344 (1880). In this case an agent for the sale of articles manufactured outside of the State was required to pay a license tax, but an agent for the sale of articles manufactured within the State was not required to pay a license tax. The court held that this was a tax upon the foreign character of the goods to be sold and was an unconstitutional regulation of commerce between the state. The court said at page 350:

> *"It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."* (Italics ours.)

Walling v. *Michigan,* 116 U. S. 446 (1885).

Ex parte Smith, 100 Fla. Part 1, page 1; 128 So. 64. This case demonstrates that the rule applies not only to manufactured articles but also to agricultural products produced outside the State and offered for sale within the State. The law involved in the Florida case discriminated

against dairy, poultry and farm products of other States in favor of similar products of Florida. The court held that this was unconstitutional. The syllabus reads:

> "A town ordinance requiring 'each and every person, firm or corporation,' selling or delivering merchandise by truck, and who does not conduct and pay a license upon an established business in the town, to pay a designated license tax, but exempting from the operation of the ordinance, dairy, poultry or farm products, raised, grown, or manufactured 'within the State of Florida,' but not elsewhere, held, invalid as a denial of equal protection and an abridgement of the privileges or immunities of citizens of other states, contrary to the Fourteenth Amendment of the Federal Constitution, as well as to Section 2, Art. 4, thereof."

The language of the Kentucky law is almost verbatim the language of the Florida law, which exempted from its operation "farm products raised . . . within the State of Florida." Following the same rule as that applied by this court in *Connolly* v. *Union Sewer Pipe Company, supra,* the Florida Supreme Court held that this exemption rendered the entire ordinance unconstitutional.

Additional cases holding discriminations against the products of merchants of other states unconstitutional are:

Ward v. *Maryland,* 12 Wall. 418 (1870).
Robbins v. *Shelby Taxing District,* 120 U. S. 489 (1886).
Minnesota v. *Barber,* 136 U. S. 313 (1890).
Brimmer v. *Rebman,* 138 U. S. 78 (1891).
New York State v. *Roberts,* 171 U. S. 658 (1898).
Bethlehem Motors Co. v. *Flynt,* 256 U. S. 421 (1921).
Boyce v. *French,* 293 Fed. 43 (1923).

In *Bethlehem Motor Corporation* v. *Flint,* 256 U. S. 421 (1921), this court held that a discrimination against products of other States violated *both* the equal protection *and* commerce clauses of the Federal Constitution.

B. The construction of this clause adopted by the lower court exempts from the tax all of the sales of retail merchants selling farm products raised by them anywhere. This construction denies the equal protection of the laws to merchants selling farm products not raised by them.

The lower court held that it was bound by the interpretation of the farm exemption clause made by the Court of Appeals of Kentucky in *Moore* v. *State Board of Charities,* 239 Ky. 729, 40 S. W. (2d) 349 (1931). The Kentucky court interpreted the language *"raised by them in this State"* to mean raised by them *anywhere* and said that retail merchants selling farm products in Kentucky "no matter where grown" by them, *were exempt from taxation,* but merchants selling farm products not raised by them *were subject to taxation.*

The exact language of the Court of Appeals in Kentucky in *Moore* v. *State Board of Charities, supra,* reads as follows:

> "Does the act violate the commerce clause of the federal Constitution?
>
> "It is argued that it does, because in defining a retail merchant it exempts those 'actually engaged in gardening or farming and selling garden or farm products raised by them in this State.' Appellants say that under this definition the tax must be collected from those who raise their farm products elsewhere but bring them into this State to sell, which, being true, we have a tax laid on interstate commerce, a thing which the State cannot do. However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not the word 'raised.' The whole import of the act is the levy of a tax measured by sales made in this State. It is the sales which count, not the place where the goods sold are produced. *It was plainly the purpose of the act to exempt from*

> *its operation those engaged in gardening and farming and selling their own products.* Such sales the Legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. We must always presume that the Legislature intended to write a constitutional act and must construe its law with that end in view. With this principle controlling us, and being convinced that it was the sale the Legislature had in mind and not the place of production, *we conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this State their own products no matter where grown.* With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls." (Italics ours.)

Under the next heading we show why the lower court was not bound by this case and why the construction of the act by the Court of Appeals of Kentucky does not fall within the general rule that the Federal Courts are bound to follow the interpretation of State statutes by State courts. However, assuming *arguendo* that the rule applies and that the statute is to be given the construction placed upon it by the Kentucky court, we submit that the exemption of retail merchants selling farm products raised by them anywhere discriminates against retail merchants selling farm products not raised by them. This point was assigned as error in the court below but was not passed on in the majority opinion. (Stewart R. 410; Assignment of Errors 10 and 11.)

Although the majority chose to ignore this discrimination, it was fully considered and discussed by Judge Cochran in his dissenting opinion, as follows (Stewart R. 387; Kroger R. 121); (8 Fed Supp. 396, 397 [1934]):

> "Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, and in that it excepts from its provision retail

merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Company, comes within that category. It operates a farm of 360 acres in Ohio named 'Country Club Farm' after the 'Country Club' brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is 'those actually engaged in gardening or farming and selling garden or farm products raised by them in this state.' The Court of Appeals of Kentucky in the case of *Moore* v. *State Board*, 239 Ky. 729, construed this exception as follows:

> "However, we are of the opinion that the phrase 'in this state' was meant to modify the word 'selling' and not 'raised.' The whole import of the act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

"The construction placed on the exception is as if it read 'those actually engaged in gardening and farming and selling in this state garden or farm products raised by them.' **It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the act. There is one consideration, however, which makes it certain that the legislature had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable**

> **that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstance of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This is a case, as I see it, where this court is not bound to follow the state court in its construction of the act. It is governed by the statement on this subject in the case of Edward Hines, Trustees, v. Martin, 268 U. S. 458, 463.''** (Boldface ours.)

The point that the interpretation of the farm exemption provision made by the Court of Appeals, while it relieved the act from the discrimination against foreign-grown farm products, created a still greater discrimination against the sales of merchants selling farm products not raised by them, was not called to the attention of the Kentucky Court of Appeals and was not discussed by that court. It was called to the attention of the Federal District Court below, but was not considered except by Judge Cochran.

We submit that there can be no justification for taxing the sales of merchants engaged in selling farm products not raised by them and exempting all the sales of merchants selling a small quantity of like products raised by them. Kroger, Gray-Von Allmen and numerous others are in the former class, The Great Atlantic & Pacific Tea Company and others are in the latter class.

In *Smith* v. *Cahoon*, 283 U. S. 553 (1931) this court held that a statute of Florida was repugnant to the Fourteenth Amendment because it did not apply to those "engaged exclusively in transporting agricultural products." The Florida law required common carriers to give a bond to protect the public against injuries resulting from negligence in the operation of such vehicles and for the protection of the persons and property carried, but it exempted

> "those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The court said that the above classification was not based on anything having relation to the purpose for which it was made. The court cited: *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 563, 564; *Southern Railway Co.* v. *Greene,* 216 U. S. 400, 417; *Truax* v. *Corrigan,* 257 U. S. 312, 332, 333; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37.

In like manner the exemption of all of the sales of retail merchants who happen to be engaged in farming and selling farm products raised by them from a license tax for selling merchandise in a store and the taxation of the sales of other merchants not engaged in farming but selling like farm products in similar stores, have no relationship to the alleged purpose of the legislation, which is stated in the title to be an "excise or license tax on retail stores" and which from its very nature is a tax on sales. Furthermore, Section 2 provides—

> "Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein."

A definition that excludes retail merchants who are engaged in farming and selling some of their products in their stores, resulting in the exemption from tax of all his sales, is purely arbitrary.

This was the holding of the Supreme Court of Illinois in *Winter* v. *Barrett,* 352 Ill. 441, 186 N. E. 113 (1933). Illinois adopted a uniform sales tax at a flat rate on the retail sales of all tangible property, as defined therein. Farm

products were not included in the definition of tangible property. Section 1 of the Illinois Act read:

> "For the purposes of this Act 'tangible personal property does not mean or include farm products or farm produce sold by the producer thereof or motor fuel.'"

The Supreme Court of Illinois said (186 N. E. 113, at page 122, col. 1, bot.):

> "The purpose of such provision in this act is therefore clearly to exempt from the application thereof those engaged in the business of selling farm products or farm produce or motor fuel to the consumer at retail. Appellee therefore contends that such provision and purpose deny to those engaged in the business of selling tangible personal property at retail equal protection of the laws and renders the act void, as in violation of the provisions of section 1 of article 9 requiring that taxes levied on occupations shall be by general law and uniform as to the class upon which it operates.
>
> * * * *
>
> Counsel for the people argue that, since by section 2 of article 9 of the Constitution the Legislature may tax not only the occupations enumerated in section 1 of that article but other occupations, and may leave still others untaxed, it may put all persons engaged in the business of selling tangible property at retail in a class, and may except therefrom those engaged in the business of selling farm products or farm produce or motor fuel at retail. It will be observed, however, that this act does not purport to be a tax upon the butcher, the baker, or like occupations, as such, to the exclusion of those engaged in other occupations. There is created but one class to whom the tax is to be applied, and that class is 'persons engaged in the business of selling tangible personal property at retail.' There is in this provision no limitation upon the word 'persons' and it must be construed to include all persons en-

gaged in such business; the only exemption therefrom being inferred by the above-quoted language of the statute declaring that certain property shall not be included within the meaning of the term 'tangible personal property.' The tax levied by the act must be uniform on all of the class upon which it operates. The question therefore arises whether there is any basis for taking those engaged in the business of selling farm products or farm produce or motor fuel at retail from this class. But for the exemption sought to be made by the act, those engaged in the business of selling farm products or produce or motor fuel at retail come within the terms of the act, for they are selling tangible personal property at retail. Uniformity of taxation and equal protection of the laws require that they, too, pay this tax, unless there be a valid basis for discrimination in their favor or for considering them a different class or vocation from that into which they naturally fall."

The Illinois court then discussed at length the arguments urged to support the farm exemption and concluded:

"He is in the business of selling tangible personal property at retail in addition to the business of producing, and the exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as the druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and, so far as the act attempts to exclude him from its provisions, it is not uniform in its application to the class on which it operates and cannot be sustained."

The farmer exemption in the Illinois sales tax act is on all fours with the exemption in the Kentucky act.

The exemption contained in the Illinois and Kentucky Sales Tax Acts is also similar to that condemned in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, previously quoted.

The arbitrary classification complained of appears upon the face of the Kentucky Act. The evidence as to the operation of the act merely emphasizes the discrimination made by the terms of the act whether read as it was written by the legislature or read as it was re-written by the Court of Appeals. *Borden's Farm Products Company* v. *Baldwin*, 79 L. Ed. 130 (1934), citing *Smith* v. *Cahoon*, 283 U. S. 554.

C. The lower court erred in holding that it was bound by the decision of the state court in Moore v. State Board of Charities & Corrections.

A majority of the lower court held that they were bound by the decision of the Court of Appeals in *Moore* v. *State Board of Charities & Corrections, supra.* In doing so the lower court disregarded both the proof in this record showing that Bohon was not a taxpayer and the statement by the Court of Appeals in the first *Moore* case that the rights of real parties should not be affected by what they might say in a case where real parties are not represented. In the first *Moore* case the court pointed out that Moore was not one of the parties subjected to the burdens of the tax. The court said:

> "It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard. *Indeed, it might be argued, with what soundness we expressly do not say, that*

they would not even be bound by the decision in this case because of the lack of representation." (Italics ours.)

All parties to the Court of Appeals case, namely: Moore, who, strangely, remained in the case after the first ruling by the Court of Appeals; Bohon, who intervened, and the State Board of Charities & Corrections, were actually seeking to have the Court of Appeals sustain the law although Moore and Bohon *pretended* to attack it. The Court of Appeals was innocently led into making an erroneous decision in a framed case in which, to use its own language in its first opinion, the real parties of interest "never have been given an opportunity to be heard."

None of the appellants or intervenors and no other taxpayer having any tax to pay under the challenged act was a party to the Moore case and did not appear therein. It follows that, again quoting the language of the Court of Appeals in the first case, the appellants and real parties in interest *should not be bound "by the decision in this case because of the lack of representation."*

We print as Appendix A, page 96, of this brief the report of the gross sales of the D. T. Bohon Company showing **"No tax due"** (lower right-hand corner) opposite "Net amount of tax," establishing the falsity of the representation made to the Court of Appeals that Bohon was a taxpayer and the admission of the State that this was true. Under these circumstances the decision of the Court of Appeals obtained by false and fraudulent representations should be disregarded.

Ward v. *Alsep,* 100 Tenn. 619, 46 S. W. 573 (1898), is directly in point. In that case, suit was filed in the Federal court attacking the validity of a tax act of Tennessee. The plaintiffs in the Federal court had large taxes to pay. Thereupon suits were brought in the State court in a colorable action to effect the case pending in the Federal court.

When this was brought to the attention of the State court that court declared:

> "When a suit is brought with a view of affecting the rights of third parties and it is apparent that this is the sole object, the suit is not adversary but collusive and should be dismissed.
>
> "It has also been held that a suit prosecuted for the purpose of obtaining a judgment that may by way of precedent affect the rights of third parties should be dismissed."
>
> "It is not sufficient that the parties be real and not fictitious, but the controversy must be real and not pro forma; nor is it sufficient that the parties exist as they are set out in the petition; nor that the plaintiff has a cause of action; beyond that the question arises: is the suit prosecuted to redress the grievance of plaintiff, *or to effect third persons who may be interested in the same question already pending in another suit and which is the primary and real object of the proceeding;* if the latter, the suit should be dismissed. Courts cannot be used for the purpose of deciding even real questions in pro forma suits, especially where the object is to affect important litigation between other parties." (Italics ours.)

Williams v. *Van Dusen,* 203 Missouri Appeals 162, 219 S. W. 395 (1920), was an action to cancel tax bills issued for street paving, on the ground of delay in completing the work. The defendant relied for defense on a decision of the State court approving the delay.

The case in the State Court was brought by a taxpayer entitled to bring suit against a proper defendant, but the plaintiff was represented by an attorney who was paid by the defendant contractor and the apparent purpose was to get a decision approving the delay. The court permitted this to be shown by way of collateral attack and said:

> "The suit was a sham, not because there was no conflict of interest between the apparently opposite

> parties had the plaintiff therein chosen to assert her interest, but because there were in fact no contesting parties: the plaintiff was none other than the contractor himself *masquerading as McQuinn.*" (Italics ours.

In *Calhoun* v. *Railroad Company*, 121 N. Y. 69, 24 N. E. 27 (1890), a taxpayer brought suit to cancel bonds of New York City issued in aid of defendant. Plaintiffs relied on a decision of the Court of Appeals of New York holding these bonds invalid. The defendants showed that this decision was obtained in an action brought at the instigation of the City. The court held:

> "An adjudication obtained under such circumstances ought not to stand in the way of a re-examination by the court of the grounds on which it proceeded."

This court had occasion to consider a comparable situation in *Bartemeyer* v. *Iowa*, 85 U. S. 129 (1873), in which this court on its own motion refused to pass on the question involved because it was satisfied that a moot case had been made to raise the particular point and the real facts would not have done so.

In *Lord* v. *Veazie*, 49 U. S. 251 (1850), an issue was framed between litigants, both of whom desired the same result (as in the *Moore* case). The purpose was to affect the claim of other parties in another case. This court said in the syllabus:

> "Where it appears to this court from, affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed."

Mr. Chief Justice Taney in his opinion says—

> "And any attempt, by a mere colorable dispute, to obtain the opinion of the court, upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. . . .
>
> "**The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.**" (Boldface ours.)

The language of the Chief Justice in *Lord* v. *Veazie* fits the *Moore* case like a glove. There was no real conflict between Moore, Bohon and the State Board of Charities. Plaintiffs and defendants had the same interest. Both plaintiffs and defendants stood to profit financially from a decision upholding the law. The interest of the parties in the *Moore* case was adverse only to the interest of appellants and intervenors in the Federal case whose rights it was intended to seriously affect.

The deception practiced on the Court of Appeals in the *Moore* case is the only reasonable explanation of the interpretation of the words "raised *in this State*" to mean raised *anywhere*. The clear intention of the legislature was to exempt merchants selling farm products raised in Kentucky, and the law could not have been passed except for this exemption. If a genuine controversy had been presented to the Court of Appeals and this question had been argued by adverse interests, the interpretation complained

of would not have been made by that court. The construction is so palpably erroneous that it should not be followed, and the court is not bound to follow a construction obtained under circumstances such as are shown in this record.

Furthermore, the rule that the Federal courts are bound to follow the construction of State statutes by State courts is not applicable where the Federal court has obtained jurisdiction prior to any construction by the State court and where the construction urged in the State court is a single decision made thereafter in a case framed for the purpose of securing such decision.

It has been repeatedly held that where the jurisdiction of the Federal court attaches and causes are submitted to that court prior to any applicable decision in the State court, the Federal courts will follow their own independent judgment and are not bound by decisions subsequently made in actions thereafter brought in the State court involving similar questions. *Kuhn* v. *Fairmount Coal Company,* 215 U. S. 349 (1910).

In this connection it should also be noted that the *Bohon* intervention and the case which went to decision in the Court of Appeals *was filed after the cases at bar had been argued and submitted to the three-judge Federal court:*

Finding of Fact No. 2

> "The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the Act, and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunction." (Kroger R. 151; Stewart R. 401.)

Not only was the case in the State court a sham but Bohon did not even claim that he was within either the class taxed or the class exempted by the exception of merchants selling farm products raised by them. He did not claim to be engaged in farming or in interstate commerce. Hence, there was no occasion for the Court of Appeals of Kentucky to discuss that feature of the case. What was said was pure dicta, which is not binding.

Another important reason for disregarding the decision in the *Moore* case is that the parties purposely kept from the court the facts with reference to the practical operation and effect of the law. The Court of Appeals did not know what this court knows as to the actual discriminatory operation of the tax and did not discuss the actual returns which were not called to the attention of that court. This court has previously held that a State court decision which does not take into consideration the actual operation of an alleged discriminatory law is not binding.

In *Johnson* v. *Wells Fargo & Company*, 239 U. S. 234 (1915), the Supreme Court held that a tax statute of South Dakota was unconstitutional, although the State court had previously sustained the measure. This court held it was not bound by the decision of the South Dakota court wherein the actual operation of the law was not discussed or considered.

D. If the construction of the farm exemption provision adopted by the District Court is approved, then all of the sales of the Kroger Company are not subject to tax and the discrimination against its competitors, including the intervenor, The Great Atlantic & Pacific Tea Company, renders the law unconstitutional.

The decision of the Kentucky Court of Appeals exempts the sales of retail merchants "actually engaged" in farming and selling farm products raised by them in this State.

This was construed to mean that the sales of retail merchants actually engaged in farming anywhere and selling in Kentucky farm products raised by them were exempt. The construction of the Court of Appeals followed by the lower court reads:

> "It was plainly the purpose of the act to exempt from its operation those (merchants) engaged in gardening and farming and selling their own products. . . . We conclude that the act must be construed so as to exempt those engaged in gardening and farming and selling in this State their own products no matter where grown."

Under the foregoing construction the appellant, The Kroger Grocery & Baking Company, is entitled to the benefit of the exemption, because (1) it is a retail merchant; (2) it actually engages in farming; (3) it actually sells its own products in its own stores in Kentucky. True these farm products are a comparatively small proportion of the total retail sales of all products sold by appellant, but the exemption is not limited either by the language of the act or by the construction placed thereon to merchants exclusively engaged in farming, but is granted to all merchants who actually engage in gardening or farming and selling their own products in their own stores. In this connection the court made the following finding of fact:

> "3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores." (Kroger R. 150, Stewart R. 401.)

This finding is amply supported by the evidence. The Kroger Grocery & Baking Company operates a farm in

the State of Ohio. This farm consists of 370 acres and is named "Country Club Farm" after the "Country Club" brand, one of the best known of the Kroger brands. The Kroger Grocery & Baking Company raises and produces on this farm, cattle, sheep, hogs, poultry, milk and other garden and farm products which are sold at retail in the Kentucky stores. (See Kroger R. 190, 287, 290 and 291.)

The Kroger Company in its separate assignment of errors (No. 11, Kroger R. 161) urged that the court erred in "failing to hold that Kroger was exempt under the construction of law adopted by the District Court." Kroger also lists in its separate statement of points to be relied upon in this court the failure to grant it the exemption accorded to other merchants in the same class (Point 6, Kroger R. 576). The other appellants urged that to grant the exemption provided in the act to merchants selling their own farm products denies the equal protection of the laws to merchants selling farm products not raised by them. (Assignments of Error 10 and 11; Stewart R. 410; Points to be Relied Upon, Stewart R. 414, Point 3.)

The exemption provision renders the law invalid

No extended argument is required to demonstrate the discriminatory operation of the farm exemption provision —no matter how it is interpreted. As written it creates a tariff against the importation of foreign-grown garden and farm products. As construed it exempts from taxation all of the sales of retail merchants who sell in retail stores some farm products raised by them, and taxes the sales of merchants who sell in like stores and under similar circumstances farm products raised by others. To exempt the sales of some of these merchants and to tax Kroger sales is discriminatory. To tax A. & P. sales and to exempt Kroger sales is equally discriminatory. We submit that the exemption, no matter how it is treated, renders the law invalid.

V. THE CHALLENGED ACT VIOLATES THE BILL OF RIGHTS AND SECTION 181 OF THE KENTUCKY CONSTITUTION

Where jurisdiction exists in the Federal courts to hear and determine a controversy, it has been held that the court will proceed to determine the whole case, including any rights asserted or questions raised under the constitution and laws of the State in which the controversy arises. *Silver* v. *L. & N. R. R. Co.* (1909), 213 U. S. 175-191; *Ohio Tax Cases* (1914), 232 U. S. 576-587; *Green* v. *L. & I. R. R. Co.* (1917), 244 U. S. 499; *Texas Co.* v. *Brown* (1922), 258 U. S. 466; *Risty* v. *C. R. I. & P. Railway Co.* (1926), 270 U. S. 378-387.

The Constitution and Bill of Rights of the State of Kentucky have been recently construed by this court in the case of *Glenn* v. *Field Packing Company*, 290 U. S. 177 (1933). In that case an injunction was granted against the State Tax Commission to restrain the taxing officials of the State of Kentucky from enforcing an act of the General Assembly of Kentucky which imposed a tax of ten cents per pound on oleomargarine sold within the State. The statute was assailed as being in violation of the Bill of Rights of the Constitution of Kentucky and the due process clause of the Federal Constitution. The District Court held that the statute, although in the form of a taxing law, was in reality a prohibition of the sale of oleomargarine and hence was invalid under the State Constitution. The question presented under the Federal Constitution was not decided.

This court said that:

> "Upon the facts found, the decision appears to be supported by principles laid down by the Court of Appeals of Kentucky, but, so far as the application of the state constitution is concerned, the ultimate deter-

mination of the validity of the statute necessarily rests with that court."

The Attorney General will probably claim, so far as the application of the State Constitution is concerned, that the validity of the statute was determined by the Court of Appeals of Kentucky in *Moore* v. *State Board of Charities & Corrections*. We have previously shown on page 60 of this brief that the *Moore* case was not a *bona fide* controversy and that the parties feigned an issue. No taxpayer was involved in that case and no question as to the prohibitory and oppressive nature of the law was properly before the court. Although the court undertook to discuss this phase of the case, it is inconceivable that the appellants should be precluded by the Court of Appeals' opinion in the *Moore* case, when it is admitted that *Moore* was not a taxpayer and it was proved that *Bohon* was not a taxpayer. Bohon falsely alleged that he was a taxpayer but only to the extent of $250.00. Even under this false allegation no question of the excessive amount of the tax was presented to the court, so there has never been a judicial determination by the Court of Appeals of Kentucky of the validity of this law as applied to merchants with large sales volume such as The Kroger Grocery & Baking Company, The Great Atlantic & Pacific Tea Company, Stewart Dry Goods Company and others.

The profit of the Kroger Company in Kentucky in 1930 was $172,000.00 before the tax. The tax takes 75% of this profit. The profit of this company in Kentucky in 1931 was $151,000.00 before the tax. The tax absorbs 75% of this profit and leaves but $39,000.00 profit on a volume of $13,000,000.00. In 1932 the Kentucky profit was $86,000.00. This entire profit was taken by the tax, which operates to turn a profit of $86,000.00 into a loss of $9,000.00 (Kroger R. 378).

Both Federal and State courts have construed the Bill of Rights and Section 181 of the Kentucky Constitution to forbid so oppressive a burden upon lawful business. In *Field Packing Co.* v. *Glenn,* 5 Fed. Supp. 4 (1933), affirmed 290 U. S. 177, (1933), the Federal District Court said:

> "This section (181) of the Constitution has been frequently considered by the Court of Appeals of the state, and it is now well settled that this section must be read in connection with the Bill of Rights contained in the state Constitution, which forbids the exercise of arbitrary power over the lives, liberty, and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, section 181 confers no power to prohibit or substantially prohibit, by taxation, a legitimate business, and any such prohibitory tax violates the Bill of Rights. *Fiscal Court of Owen County* v. *F. & A. Cox Company,* 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83; *City of Louisville* v. *Pooley,* 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582; *Sperry & Hutchinson Co.* v. *Owensboro,* 151 Ky. 389, 151 S. W. 932, Ann. Cas. 1915A, 373."

The court added (Page 6, Column 2):

> "It is not within legislative competence, by taxation, to destroy a legitimate business in times of depression any more than in normal times, and, as we are living in subnormal times, the validity of the tax in question must be measured by its effect during these times. Under improved economic conditions it is conceivable that the tax complained of here would not be prohibitive. We are satisfied from the record that it is prohibitive now."

For these reasons the three-judge court held that the oleomargarine tax violated the Kentucky constitution. That holding was affirmed by reason of the State constitution, although a similar tax was upheld as not violating the con-

stitution of the State of Washington. *Magnano* v. *Hamilton,* 292 U. S. 40 (1934).

Kentucky cases show that the Court of Appeals of that State has strictly construed Section 181 and the Bill of Rights of the Kentucky Constitution to forbid the levy of taxes on lawful business which absorb a large percentage of the normal profits of such business.

In *Louisville* v. *Pooley* (1910), 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582, the court held unconstitutional an ordinance of the city of Louisville passed in order to put out of business people whose occupation was lending money on salaries. The court declared that the imposition of a license tax upon the business of lending money on salaries and chattels which equals eighty (80%) per cent of the average earnings of all persons engaged in such business was so unreasonable, oppressive and prohibitive as to be void.

In the case of *Fiscal Court of Owen County* v. *Cox, Court of Appeals of Kentucky* (1909), 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83, the court held unconstitutional a license tax on wagons. Syllabus 3 of the case reads (21 L. R. A. [N.S.] 83):

> "A license tax on a four horse wagon used for hauling freight for hire, which is nearly three times as much as that imposed on three horse wagons, is void for discrimination."

In the body of its opinion the court declared:

> "It may be conceded that, ordinarily, the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall* v. *Com.*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing cases.) While there are numer-

ous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000.00, or imposing upon every merchant a license of $5,000.00, or upon every washerwoman a tax of $1,000.00 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations; *but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax?* Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that *among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life, and the right to acquire property; and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation,* the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. *Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution.* As the evidence in this case shows that the license tax in question is *prohibitive, we have no hesitancy in declaring it invalid."*

In the case of *Sallsbury* v. *Equitable Purchasing Co.* (1917), 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, the court held unconstitutional a license tax upon the business of lending money on salaries. The syllabus of the case reads:

> **"A license tax upon the business of lending money on salaries which is equal to one-third of the net earnings of the largest business of any individual engaged in such occupation is prohibitive, and therefore illegal."**

At page 353 the court said:

> ". . . when it is admitted, as is done here, that the license fee exacts practically *one-third of the net earnings* of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression necessarily created that the license is prohibitive and therefore illegal."

Concluding, the court says, at page 355:

> "In short, we hold that no municipality under a free government like ours, has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

In the case of *Hagar* v. *Walker* (1908), 128 Ky. 1 (9), 107 S. W. 254, the court declared:

> "Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that, if it should be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the Courts would interpose to protect the class of persons

> affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have 'the right of seeking and pursuing their safety and happiness' and 'the right of acquiring and protecting property.' "

In dealing with particular taxes the Court of Appeals of Kentucky has frequently passed on the question whether they were so oppressive as to be unconstitutional.

In *City of Lexington* v. *McQuillan* (1839), 9 Dana 513, 39 Ky. 513, the court said:

> "The legislature, in the plentitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole Commonwealth."

The above language applies directly to the facts in the instant case which show that more than 80% of the entire revenue produced by the challenged tax will be paid by 19 merchants. Two merchants having less than 8% of the total sales will be required to pay more than 50% of the tax levied by the act.

In *Sperry* v. *Owensboro* (1912), 151 Ky. 389, 151 S. W. 932, the court struck down as unconstitutional a city ordinance imposing a tax of $300.00 on a trading stamp company on the ground that the tax was prohibitive. In the opinion, the court said, at page 393:

> ". . . . courts will not sustain prohibitive regulations made under the guise of taxation. The plaintiff's business is not unlawful. It is a business which the state itself licenses. And while the city may also tax it, the tax must be imposed in good faith under the taxing power, and not for the purpose of prohibiting the business. . . . We think it evident from the ordinance as a whole that the tax of $300.00 on stamp companies was intended to be prohibitive and break

up the business. Appellant's gross business per annum under the evidence amounts to about $5,000.00, and its net profits amount to about $500.00 per annum. To tax such a business $300.00 per annum must have been intended to break it up."

Again at page 394:

"It is true the business may increase, and there may be more profit in it than is shown by the evidence; but the ordinance was evidently aimed at it as it is. . . ."

The Kentucky decisions cited and quoted above clearly show that the challenged act violates the State Constitution.

The lower court found that the average profit to sales during the past three tax years for Kroger has been as follows:

1930	.55 of 1%
1931	.9 of 1%
1932	1.15%

The one per cent tax imposed on Kroger, which does not fall on the 24,000 competing retail merchants, takes practically all of this profit. Measured by the rules laid down by the Court of Appeals of Kentucky the act must fall.

Kroger's experience is similar to that of the other appellants affected by the act. (See Kroger R. 248, 258. See testimony of Byck and Schachter to the effect that profits in department stores during the three-year period average one per cent when compared to sales. Stewart R. 85, 482; Kroger R. 324, 435.)

The mere fact that the State has the power to levy taxes does not permit the exertion of that power to its fullest extent under the limitations of the Kentucky Constitution. In this respect the State rule differs from the Federal rule. In the instant case the sales of a few persons are selected for heavy taxes and the sales of 24,000 competing merchants

are not subjected to any burden. Unlike the ordinary sales tax the burden cannot be shifted. The sales of The Kroger Grocery & Baking Company are subjected to a greater aggregate tax than the combined and total tax on the aggregate sales of 24,000 other merchants although Kroger's sales are only a small percentage of the sales in Kentucky. The Stewart Dry Goods Company, with sales of three million dollars, is required to pay a tax on their sales which is one-fourth as large as the tax paid by 24,000 competing merchants on all their retail sales. Under the rules above cited such a tax violates the Constitution of the State of Kentucky.

CONCLUSION

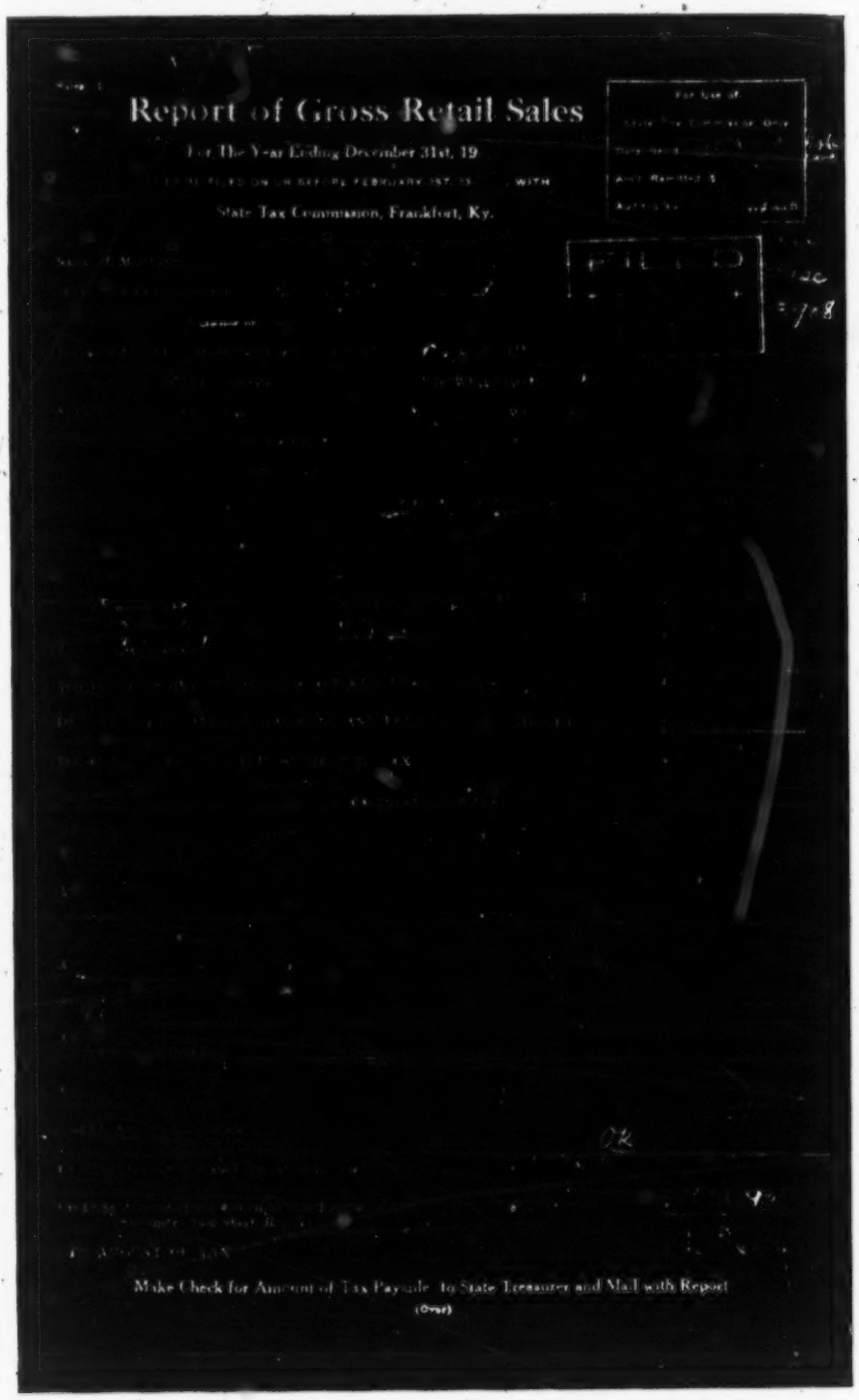
For the reasons herein stated, we submit that the decree of the lower court should be reversed and that the Kentucky Gross Sales Tax Law from the time of its enactment until its repeal was unconstitutional and should be so pronounced by this court.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
JOHN C. DOOLAN,
HARRY KASFIR,
JAMES W. STITES,
Solicitors for Appellants.

Of Counsel,
NICHOLS, MORRILL, WOOD, MARX & GINTER,
TRABUE, DOOLAN, HELM & HELM.

APPENDIX A



Report of Gross Retail Sales

For The Year Ending December 31st, 19

WITH

State Tax Commission, Frankfort, Ky.

Make Check for Amount of Tax Payable to State Treasurer and Mail with Report

(Over)

STATE OF
COUNTY OF

I, do solemnly swear that the statements made in the foregoing report are true to the best of my knowledge and belief.

Name

Subscribed and sworn to before me by this day of 19

No.

REPORT
OF
GROSS RETAIL SALES

For the Year Ending Dec. 31, 19

To be Filed on or before January 20th Following Close of Year for Which Report is Made

State Tax Commission

APPENDIX B

No. 34807

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,
Plaintiff,

v.

STATE BOARD OF CHARITIES AND CORRECTIONS,
JOHN P. HASWELL (LOUISVILLE, KY.)
VERNON RICHARDSON (DANVILLE, KY.)
JOHN SKAIN (LEXINGTON, KY.)
JOHN T. STAMPER (BARBOURVILLE, KY.)
C. ROY STEINFORT (COVINGTON, KY.)
CHARLES DAVIDSON (BEREA, KY.)
MRS. SHIRLEY BURNS WELLMAN (LOUISA, KY.)
MISS NANCY A. DAY (CLINTON, KY.)
HANLY BOHON AND KATHERINE BOHON, HIS WIFE (HARRODSBURG, KY.)
MINNIE B. RAINE, WIDOW (HARRODSBURG, KY.)
D. T. BOHON, JR. AND MARY WARD BOHON, HIS WIFE, (HARRODSBURG, KY.) AND
LILLIAN K. BOHON, WIDOW (HARRODSBURG, KY.),
Defendants.

PETITION IN EQUITY

Plaintiff, Louisville Courier-Journal Company, states that it is a corporation duly organized under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and all powers incident and necessary to publishing and distributing a newspaper.

Plaintiff states that it is a taxpayer of the City of Louisville, County of Jefferson, and State of Kentucky, and that it has for many years paid taxes to the County of Jefferson and State of Kentucky and has paid its taxes to said County of Jefferson and State of Kentucky up to date.

Plaintiff states that the defendant, State Board of Charities and Corrections, is a body politic and corporate created by the Legislature of the State of Kentucky and has power to sue and be sued, contract and be contracted with.

Plaintiff states that the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Nancy A. Day, are members of the said State Board of Charities and Corrections.

Plaintiff states that at a recent meeting of the members of said State Board of Charities and Corrections, said Board by a majority vote decided to purchase certain real estate and buildings thereon in Mercer County, Kentucky, which real estate and buildings include the settlement known as Shakertown, for the purpose of establishing an epileptic colony and said Board is threatening to make a contract with the defendants, Hanly Bohon and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, Lillian K. Bohon, all of Harrodsburg, Mercer County, Kentucky, for the purchase of the aforesaid land buildings for the aforesaid purpose. Plaintiff states that said property is approximately thirty-five miles from Frankfort, Kentucky, and that the Counties of Woodford and Jessamine intervene between Frankfort and said property.

Plaintiff states that the defendant, State Board of Charities and Corrections, has no authority to purchase said site, or any part thereof, for said purpose, nor have the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Nancy A. Day, composing said Board, authority to authorize the purchase of said property, and that the action of said Board in voting to purchase said property for said purpose is illegal and void for the following reasons, to-wit:

(1) Plaintiff states that if said Board were to purchase said land for the aforesaid purpose, it would, for all practical purposes, have to establish a new institution thereon for the care of epileptics separate from the Feeble Minded Institute at Frankfort, Kentucky, and that the law by which said defendant, State Board of Charities and Corrections, is governed does not contemplate the establishment of a new institution for the care of epileptics separate from the institution at Frankfort; that if the said law does

contemplate the establishment of a new constitution separate from and in addition to the Feeble Minded Institute at Frankfort, then so much of said law as attempts to authorize the State Board of Charities and Corrections to do so is unconstitutional and void, in that it violates Section 51 of the Constitution of Kentucky.

(2) Plaintiff states that said Board of Charities and Corrections has not sufficient revenue to pay for the land which it proposes to buy at Shakertown, hereinabove described, and that were it to contract to purchase said land at Shakertown it would have to use its general funds for that purpose, which it has no authority to do, nor has it authority to use its general funds for said purpose, even though **it intends to reimburse itself later out of its part of the collections from the Gross Sales Tax**; that it has already anticipated part of its revenue from said Gross Sales Tax by expending the sum of $24,000.00 for the purchase of a tract of land adjoining the State Reformatory at Frankfort; **that the constitutionality of said Gross Sales Tax Law is being contested in the United States District Court for the Eastern District of Kentucky, it being claimed that the same is unconstitutional** and void and that until said suit is finally disposed of it will be impossible to know whether said Gross Sales Tax Law is constitutional and enforcible.

Plaintiff says further that the defendant, State Board of Charities and Corrections, and the defendant members thereof do not know just what revenue they will derive from said Gross Sales Tax, even though the same be upheld as constitutional, and that they have no right or authority to use any part of their general funds for the purchase of the aforesaid land at Shakertown, or to bind themselves to do so by the contract which they propose to sign.

(3) Plaintiff states that even if the Court should decide that the defendant, State Board of Charities and Corrections, has authority to establish and maintain a new institution for epileptic persons, separate from the Feeble Minded Institute at Frankfort, said Board of Charities and Corrections only has authority to establish such an institution "if convenient to do so", and that it is not con-

venient for the said Board to expend the sum of $110,000.00, or any part thereof, for the purchase of said property at Shakertown, because it has not sufficient funds to pay therefor and because the other institutions under its control are so greatly in need of funds for their improvement and maintenance, and particularly the State Reformatory at Frankfort, and that its action in proposing to purchase said property at Shakertown is arbitrary and void.

(4) Plaintiff states further that even if the defendant has the authority to establish a new institution for the care of epileptic persons separate and distinct from the Feeble Minded Institute at Frankfort, the place which it proposes to purchase at Shakertown is not suitable for that purpose; that the same is located on one of the main highways of the State and that said highway divides the property proposed to be purchased; that said highway connects Harrodsburg, with Lexington, Nicholasville and Versailles, and that it would be dangerous for the inmates of the institution proposed to be established for the same to be located upon said highway on both sides or on either side of said highway, contiguous thereto.

Plaintiff states that the buildings located on said property are more than a century old and not fitted for the purposes proposed; that to renovate and rehabilitate them would be costly; that there is no police protection, no fire protection, no adequate water supply, and that the land is not fertile for farming purposes.

Plaintiff states that a school for orphan girls has been established in close proximity to the land proposed to be used for said epileptic colony and that said orphan school for girls would be damaged by the establishment of said epileptic colony, and it is not suitable for such a colony to be located contiguous to said school.

Plaintiff states that for the aforesaid reasons the defendant, State Board of Charities and Corrections, is not authorized to enter into the contract referred to and that the aforesaid members of said Board have no authority to authorize the execution of said contract.

Plaintiff states that unless enjoined by this Honorable Court, the said defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort,

Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, will convene on Wednesday, July 29, 1931, for the purpose of deciding whether said State Board of Charities and Corrections will execute said contract for the purchase of said land, which it decided to purchase at its last meeting, and that should said contract be signed this plaintiff will suffer as a taxpayer and other taxpayers of the State of Kentucky will suffer great and irreparable injury; that it has not adequate remedy at law.

Plaintiff states that the defendants live in various counties in the State, as set out in the petition, and that plaintiff has not time to give them notice of a motion for an injunction in time to make said motion and have this Court pass upon the same before said Board convenes on Wednesday, July 29, 1931, and that irreparable injury will result to this plaintiff from delay in giving notice and making a motion for a temporary injunction, and that it is essential to the preservation of the plaintiff's rights that a temporary order be entered by this Court restraining said defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, and each of them, from authorizing the execution of the contract herein referred to and restraining the defendant, State Board of Charities and Corrections, from executing such a contract until the further order of this Court.

Plaintiff states that no injunction or restraining order has been applied for by it against said defendants, or either of them, or refused by the Court or any judge.

Plaintiff states that the defendants, Hanly Bohon, and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, and Lillian K. Bohon, are made parties to this action because of their interest in said proposed contract and, called upon to set up any defense they may have to this action or be forever barred.

WHEREFORE, plaintiff, Louisville Courier-Journal Company, prays a temporary order restraining the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, and each

of them, from authorizing the State Board of Charities and Corrections to execute, and restraining said State Board of Charities and Corrections from executing, any contract with the defendants, Hanly Bohon and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, and Lillian K. Bohon, or either of them, for the purchase of the property referred to in the petition at or near Shakertown for the purpose of establishing an epileptic colony, or any purpose, and from executing any contract with any one for the purchase of land for the use of an epileptic colony until the further order of this Court, and on the hearing prays that the defendants, and each of them, be perpetually enjoined and restrained as above prayed for, and finally for all relief in equity and good conscience to which it may be entitled.

PETER, LEE, TABB, KRIEGAR & HEYBURN.
CARY TABB,
Attorneys for Plaintiff.

Emanuel Levi says he is Vice-President of the Louisville Courier-Journal Company, plaintiff in the above styled action, and the Chief Officer thereof in the State of Kentucky and that the statements of the foregoing petition are true.

EMANUEL LEVI.

Subscribed and sworn to before me by Emanuel Levi this 29 day of July, 1931. My commission expires on the 7th day of January, 1932.

DOROTHY PEIL,
Notary Public, Jefferson County, Ky.

The answer filed on August 3, 1931, is in words and figures as follows:

No. 34807

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,

Plaintiff,

v.

STATE BOARD OF CHARITIES AND CORRECTIONS, *et al,*

Defendants.

PARAGRAPH No. 1

The defendants, for answer, deny that State Board of Charities and Corrections has no authority to purchase said site, or any part thereof, or for said purpose, denies that the individual members of the Board have no authority to authorize the purchase of said property; deny that any action of the Board in voting to purchase said property or for said purpose, is illegal or void, or for the following reasons; deny that if said Board were to purchase said land for the aforesaid purpose, it would, or for all practical purposes, or at all, have to establish a new institution for the care of epileptics or separate from the Feeble Minded Institute at Frankfort, Kentucky, or that the law under which said Board is governed, or any other law, does not contemplate the establishment of a new institution for the care of epileptics; deny that, if said law does not contemplate the establishment of a new institution as separate from or in addition to the Feeble Minded Institute at Frankfort, then so much of said law as attempts to authorize said Board to do so is unconstitutional or void, or that it violates Section 51 of the Constitution of Kentucky; denies that were it to contract to make said purchase it would have to use its general funds for that purpose, or that it has no authority to do so; deny that it has no authority to use its general funds for the purpose of said purchase even though it intends to reimburse itself later out of the pro-

ceeds of the Gross Sales Tax; deny that they do not know the amount to be available from the Gross Sales Tax in the event it is upheld by the Courts; deny that they have no right or authority to use any part of their general funds for the purchase aforesaid, or to bind themselves to do so by the proposed contract.

The defendants deny that it is not convenient for said Board to make said expenditure because of insufficient funds to pay therefor or because other institutions under control of the said board are so greatly in need of funds; deny that its action in proposing to make said purchase is arbitrary or void.

The defendants deny that the property proposed to be purchased is not suitable for the purpose; deny that it would be dangerous for the inmates of the institutions proposed to be established for same to be located on both sides of said highway; deny that the buildings are not fitted for the purposes proposed; deny that renovation or rehabilitation of them would be unreasonably costly; deny that there is no adequate water supply; deny that said orphan school for girls would be damaged by the establishment of the epileptic colony, or that it is not suitable for such a colony to be located contiguous to said school; deny that for the aforesaid or any reasons, the Board is not authorized to enter into the contract referred to, or that its members have no authority to authorize the execution of the contract; deny that unless enjoined the plaintiff will suffer great or irreparable injury, or that it has no adequate remedy at law; deny that irreparable or any injury will result from delay in giving notice of the application for a restraining order.

PARAGRAPH No. 2

The defendants, still relying on the allegations of the first paragraph, for further answer say:—

That the defendant, State Board of Charities and Corrections is a body politic and corporate under the laws of Kentucky:

That in order to provide for the custody, maintenance and welfare of its citizens who by reason of mental or physical infirmities, neglect or misfortune must necessarily

be held in its custody or under its supervision, the Commonwealth has provided, and has for several years past has maintained, nine penal and charitable institutions as follows:—State Reformatory at Frankfort, Ky.; State Penitentiary at Eddyville, Ky.; Houses of Reform, Greendale, Ky.; Eastern State Hospital, Lexington, Ky.; State Hospital for the criminally insane, Lakeland, Ky.; Western State Hospital, Hopkinsville, Ky.; Feeble-Minded Institute, Frankfort, Ky.; and House of Reform for Girls in Shelby County, Kentucky;

That under the law of the Commonwealth the Board is vested with the control, management and administration of all of said institutions;

That it is the policy of the Commonwealth, as declared by Statute, including that Statute under which the Board acts, to exercise a broad humane and practical policy in the care and treatment of all of the inmates of said institutions, and all those who may become inmates thereof, with the end in view of encouraging the employment of all inmates able to do any character of labor, at some profitable labor, so as to assist in paying their maintenance, and by reason of being employed to make them more contended and happy;

That each of the said nine institutions is now congested and filled to largely more than its capacity so that it is unable at any of them to give to the inmates the proper care and attention;

That included in those citizens of the Commonwealth who are so unfortunate as to be inmates of said institutions, is a class of persons afflicted or epilepsy, which is a disease affecting them periodically; seizures are fits usually only lasting for a short period. Many of such persons so afflicted can, and should do manual labor and should do so because of the benefit derived from the exercise, and the further benefit of employment which makes them contented. Many of such persons so afflicted are able to perform, under proper supervision, manual labor sufficient to more than maintain themselves.

That it is the declared policy and purpose of the Commonwealth, that these epileptics should be segregated from the other inmates who are of unsound mind, lunatics or

feeble minded, and given simple employment or work in a colony, home or large family to themselves, all for the reason that it is best for the welfare of the epileptics and other afflicted persons that they be so segregated and employed;

That because of lack of facilities for so locating the epileptics and segregating them from the other inmates, the Board has never been able to do so, but that it is now and has for years been compelled to confine and restrain all these unfortunates, both epileptics, feeble-minded persons and lunatics together and in the same institution or institutions, all of which is detrimental to the best interests of all concerned.

That the Board now has in its custody about 650 epileptics, (at least more than 625 and less than 675) who are confined along with its other wards at the Eastern and Western and Central State Hospitals and at the Feeble Minded Institute to the great detriment and injury of all;

That along with the declared policy of the Commonwealth, the Board deems it highly important and for the best interests of these epileptics that they be removed from these institutions and formed into a colony or large family on a farm where they can have the advantages and freedom of country life, and be employed at the ordinary labor incident to farming, thereby causing many of them to be entirely self supporting and greatly contributing to their welfare and happiness;

That, having in view these advantages to its wards and to the Commonwealth, the Board sought an available place for the establishment of such a farm and colony, believing that the laws of the Commonwealth furnished ample authority for it to purchase such a farm and to establish thereon such colony, and to improve and equip it for their maintenance and to remove the epileptics thereto.

That the defendants, Hanly Bohon, et al., offered to the Board the property in Mercer County, Kentucky, commonly called Shakertown, consisting of more than 800 acres, most of which is suitable for farming and stock raising, with eight large brick and stone buildings thereon, besides stock barns, tobacco barns, and tenant houses, **for the sum of $110,000.00** payable in interest bearing State Warrants of the Commonwealth of Kentucky;

That the Board has had the proposition under advisement for more than nine months, during which time it has caused a survey to be made thereof by competent engineers, architects, psychologist and others skilled and experienced in the treatment of persons afflicted with mental disease, with the result that it is advised and alleges that the buildings thereon are of a permanent nature, such as to lend themselves easily to such remodeling and rehabilitation as would be needed to turn them into suitable buildings for the housing of such an epileptic colony, and that the value of the buildings alone in connection with such project is more than double the amount required to purchase the entire property; that it is further advised that the land is well suited for its purposes, from standpoints of sanitation, water supply, fertility and location;

That the resolution attacked by the petition was a resolution proposing to purchase said property on the terms referred to;

That at the time of the restraining order herein it was proceeding with its business in regular order and with the intention of further considering the question of completing the purchase of said property for the purpose of establishing thereon said epileptic colony and transferring thereto the epileptics as above set out, all of which is necessary for it to do in order to properly provide for their welfare and maintenance and to relieve the over crowded and congested condition of the other institutions referred to;

WHEREFORE, for further answer defendants pray the plaintiff's petition be dismissed and held for naught, they taking thereto the cost herein expended for all proper relief both fair and equitable.

J. W. CAMMACK,
Attorney General.

S. H. BROWN,
Assistant Attorney General.

ATTORNEYS FOR THE STATE BOARD OF CHARITIES AND CORRECTIONS.

C. R. RANKIN,
Attorney for Hanly Bohon, et al.

At a court held on November 21, 1931, the following order was entered:

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,

Plaintiff,

vs. No. 34807 INJUNCTION

STATE BOARD OF CHARITIES AND CORRECTIONS, ET AL.,

Defendants.

This action coming on to be heard upon the motion of the plaintiff for a permanent injunction upon the pleadings and proof and the court being sufficiently advised is of the opinion that the establishment of epileptic colony on the proposed site to be purchased (Shakertown property) would constitute the establishment of a separate institution, and the court being further of the opinion that the funds appropriated for the State Board of Charities and Corrections under the Act of 1930, known as the Gross Sales Tax Act, cannot be used for the establishment of a separate institution, it is therefore ordered that the said motion be and the same is hereby sustained, and that the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Orvetta Brummett, and each of them, be and they are hereby permanently enjoined and restrained from authorizing the State Board of Charities and Corrections to execute, and said State Board of Charities and Corrections is hereby permanently enjoined and restrained from executing any contract for the purchase of the land in Mercer County, Kentucky, referred to in the petition, known as the Shakertown Tract, or any part thereof, for the purpose of establishing an epileptic colony, unless and until authorized by law.

THOS. B. MCGREGOR, *Judge.*

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing Forty-two (42) pages contain a full, true and complete transcript of the record and proceedings in the case wherein Louisville Courier-Journal Company is plaintiff and State Board of Charities and Corrections, et al., are defendants. No. 34807, an action lately pending in the aforesaid court; also contains a copy of the Opinion of Judge Gus Thomas, Chief Justice of the Court of Appeals of Kentucky, as the same appears of record and now on file in my office.

Witness my hand as Clerk aforesaid, this September 2, 1933.

KELLY C. SMITHER,
Clerk Franklin Circuit Court.

By....., D. C.

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, H. Church Ford, Judge of the 14th Judicial District of Kentucky, and ex-officio Sole Judge of the Franklin Circuit Court, do hereby certify that Kelly C. Smither, who signed the foregoing certificate, is now, and was at the time of signing the same Clerk of said court, duly elected, qualified, and sworn: that his said signature is his own genuine and proper handwriting, and that said certificate and anthentication are in due form of law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of said court to be hereunto affixed at Frankfort, Kentucky, this 2nd day of September, 1933.

H. CHURCH FORD,
Judge of the 14th Judicial
District of Kentucky.

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court, within and for the County and State aforesaid, do hereby certify that Honorable H. Church Ford, who signed the foregoing certificate, is now and was at the time of signing the same, Judge of said court, duly elected, commissioned and sworn, and that his said signature is his own genuine handwriting.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said court, in my office in Frankfort, Kentucky, this 2nd day of September, 1933.

KELLY C. SMITHER,

Clerk Franklin Circuit Court,
Frankfort, Kentucky.

APPENDIX C

AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

"Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or con-

trolled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand ($400,000) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000) Dollars and not exceeding Five hundred thousand ($500,000) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000) Dollars, and not exceeding Six hundred thousand ($600,000) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000) Dollars, and not exceeding Seven hundred thousand ($700,000) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000) Dollars and not exceeding Eight hundred thousand ($800,000) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000) Dollars and not exceeding Nine hundred thousand ($900,000) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000) Dollars, and not exceeding One million ($1,000,000) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe,

giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, one thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one, One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may, hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section 4263-4 of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtain-

ing judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications herein required to be made, shall be confidential, and any persons divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One thousand ($1,000) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section Five of this act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts,

and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.